

February 1978

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Recommended Citation

Philip N. Hablutzel, *State Regulation of Branch Banking*, 16 Duq. L. Rev. 679 (1978).

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Articles

State Regulation of Branch Banking

*Philip Hablutzel**

INTRODUCTION

It is usual to describe the banking system of the United States as a "dual banking structure." This expression is used because commercial banks are either created, chartered, and primarily regulated by the various states or are created, chartered, and regulated by the federal government. Throughout much of the history of banking law, the courts and legislatures have refereed the divergent interests of state banks and national banks, often with the stated purpose of equalizing the competition between them. To view the dual structure of commercial banking as a discreet legal and financial universe makes sense so long as commercial banking is separate from other financial institutions in its functions, services, methods, and areas of operations. But it now is less clear than in earlier times that other financial institutions such as savings and loan associations (also a "dual system"), credit unions (also a "dual system"), and finance companies are or should be in distinctly different businesses.¹

The question of whether any or all financial institutions should be allowed to operate out of more than one location has usually been termed the "branch banking" controversy. A prominent part of this problem has been the very question of what a "branch" is or how it should be defined. This article summarizes and analyses the current state laws regarding the regulation of branch banking of state-chartered banks. This analysis then serves as the basis for addressing subsequent questions such as:

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1. The proper relationships between these various financial institutions and the proper way to regulate them has been the subject of the Report of the President's Commission on Financial Structure and Regulation (December, 1972) ("The Hunt Commission") and recent bills in Congress. An analysis of those proposals is given in Verkuil, *Perspectives on Reform of Financial Institutions*, 83 YALE L.J. 1349 (1974) [hereinafter cited as Verkuil].

1. To what degree can state laws restricting branch banking be successfully evaded through acquisitions of additional banks by a bank holding company?
2. To what degree will state statutes limiting "undue concentration" and more general antitrust considerations limit branch banking?
3. To what degree may national banks establish branches under the McFadden Act² and subsequent judicial interpretation of it?

All of the states except Wyoming have legislated with respect to branch banking. Statutory schemes of regulation vary widely. Some permit statewide branching, some permit branch banking with limitations, and others prohibit the operation of branch banking completely. The states which permit limited branch banking vary as to the type of limitation: allowing branches only within the town or city in which the principal or main office is located; allowing branches only in the same county as the main office; limiting the number of branches per bank; limiting branches based on population of a given region; and prohibiting branches in the same city where another bank has its principal office. The effects of the variations in state branch banking regulations are reflected in the variations in the banking market. Within the United States as of 1970 there were 14,000 "unit banks," banks operated at a single location without branches. Of these, 85 percent have less than \$25 million in deposits and serve populations of less than 1,000. On the other hand, commercial banks permitted to have branches operate in 29,000 locations with each location serving an average of 6,700 people.³

There are many causes of these variations. As a beginning step in examining the continuing controversy over the values and dangers of branch banking in general, this article will concentrate on the present statutory restrictions on branch banking of state commercial banks. But to appreciate fully the impact of branching stat-

2. 12 U.S.C. § 36(c) (1970).

3. Rose, *Are Those 11,400 Banks Really Necessary?*, FORTUNE, Nov., 1970, at 113; Bratter, *The Role of Branch Banking in Area Development*, 1 MERGERS AND ACQUISITIONS (THE JOURNAL OF CORPORATE VENTURE) 87, 88 (1966). A view on restrictions on entry to and exit from the market is given in Rose, *Bank Regulation & The Reforms We Really Need*, FORTUNE, Dec., 1977, at 123.

utes one must consider both national branch banking policy and state regulatory statutes.

BRANCHING FOR NATIONAL BANKS

The federal government sought to provide a balance in the dual system of federal-state banking law through the passage of the McFadden Act in 1927. With respect to branch banking, the McFadden Act stated that a national banking association "may, with the approval of the Comptroller of the Currency, establish and operate new branches . . . at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority"⁴ This statute extended to national banks branching privileges limited only by state authorized branch banking restrictions. This was due in part to a response to an observable trend during the early nineteen hundreds in which the substantial growth in some states of state banks with branches threatened to impair the national banking system. Therefore, the McFadden Act was specifically designed to allow national banks to achieve "competitive equality" with state banks with respect to branching, but left the degree and desirability of branching banking up to each state.

This interpretation of the McFadden Act was upheld unanimously by the Supreme Court in *First National Bank v. Walker Bank & Trust Co.*⁵ The Court held that the Comptroller was required to abide by a Utah state statute that permitted establishment of a branch only by acquisition of an existing bank that had been in operation for five years or more. The Comptroller had argued that once a state authorized any branching, federal standards determined the criteria for allowing national banks to open branches in that state. The Court found this argument untenable in light of the policies of the McFadden and Glass-Steagall Acts. In assessing the pertinent legislative history, Justice Clark's opinion for the Court recognized that the "intent of Congress [was] to leave the question of the *desirability* of branch banking up to the States."⁶ This intent was to be implemented through a policy of

4. 12 U.S.C. § 36(c) (1970).

5. 385 U.S. 252 (1966).

6. *Id.* at 258 (emphasis added).

“‘competitive equality’ insofar as branch banking was concerned.”⁷ Thus, under the *Walker Bank* theory, state and national banks could compete on an individual basis, but neither system had branching privileges unavailable to the other. It was held that the Comptroller must apply the state statutory provisions in their entirety when he is considering a national bank’s branch application although he is not bound by state judicial or administrative interpretations. Thus, an analysis of the branching abilities of a national bank must begin with the determination of the banking abilities of state-chartered banks in the state where the national bank is located.

I.

SUMMARY OF STATE STATUTES

The District of Columbia and forty-nine⁸ states with regulations on branch banking can be classified into roughly three main groups.⁹ These classifications are shown in *Table 1*. More detailed tables will describe each sub-group of states. After each of those tables, a general description of each state’s branching system is given. When a state has restrictions of more than one type, as shown in column two, the general discussion of that state’s regulations is provided the first time that state appears in any list.

Some briefer summaries of state branching regulations have been provided by other authors.¹⁰ This article will provide more details to demonstrate the rich variety of approaches taken by various states. That variety will then be the basis for some conclusions on how state legislatures view banks and their business.

7. *Id.* at 261.

8. Except Wyoming which has no statute.

9. A similar list is given at 1 FED. BANKING L. REP. (CCH) ¶ 3106 (1976). This chart differs in a few instances from the current listings given there.

10. See Note, *Branch Banking*, 38 NOTRE DAME LAW. 315 (1963); Gup, *A Review of State Laws on Branch Banking*, 88 BANKING L.J. 675 (1971).

TABLE 1

Statewide Branching Permitted (14 total) Generally unrestricted (6)	Limited Branch Banking Permitted (26 total) No branch in same town as another bank (9)	No Branch Banking Permitted (10)
Arizona	Connecticut	Colorado
District of Columbia	Indiana	Illinois
Maine	Iowa	Kansas
Maryland	New York	Minnesota
Rhode Island	North Dakota	Missouri
Vermont		Montana
*	<i>Number of branches limited (4)</i>	Nebraska
Capital and surplus requirements (8)	Connecticut	Oklahoma
Alaska	Hawaii	Texas
California		West Virginia
Delaware	<i>Limits by population (4)</i>	
Idaho	Georgia	
Nevada	Mississippi	
New Jersey	<i>Branch permitted only in</i> <i>same county (19)</i>	
North Carolina	Alabama	
South Carolina	Arkansas	
	Florida	
	Georgia	
	Indiana	
	Iowa	
	Kentucky	
	Louisiana	
	Massachusetts	
	Michigan	
	<i>Branch permitted only in</i> <i>same town (2)</i>	
	New Hampshire	
	Washington	
	**New Jersey for towns of less than 10,000 population.	

STATEWIDE BRANCHING PERMITTED

Unrestricted

There are six states which allow unrestricted statewide branch banking. In these states commercial banks can establish branch banks throughout the state de novo. The branching statutes of these states are the most liberal in so far as there are no expressed restrictions such as capital requirements, population restrictions, or limits on the number of branches. Nevertheless, each new branch must receive prior approval of the state's banking regulatory body.

TABLE 2

*Statewide Branching States
Unrestricted**Comments*

Arizona	Termed bank offices rather than branches.
District of Columbia	
Maine	Also limited time or seasonal branch offices allowed — but not at same location or primary service area of full-time branch. Prohibits mobile units.
Maryland	
Rhode Island	
Vermont	

In Arizona the state superintendent "shall be guided by the standards prescribed for the issuance of a banking permit insofar as such standards are reasonably applicable." Branches may be established "anywhere in the world."¹¹

The District of Columbia statute allows for District-wide branching by implication. The statute defines a branch and provides that no branch may be established without the approval of the Comptroller of the Currency.¹²

Prior to 1975, Maine allowed branches only within the same county as the principal bank or in a county adjoining.¹³ The new banking statute of 1975 expanded the area for branching to "anywhere within this State."¹⁴ Satellite facilities, whether "manned or unmanned," are held to be branches.¹⁵ Expressly prohibited are mobile branches or branches in other states.¹⁶

11. ARIZ. REV. STATS. § 6-190 (1973). *State Tax Comm'n v. Yavapai County Sav. Bank*, 52 Ariz. 374, 81 P.2d 86 (1938), held that an external bank office performing some functions was not a branch if it was not receiving or paying out of deposits.

12. D.C. Code Encycl. § 26-103(b) (West 1951).

13. This held for savings banks, trust companies, and savings and loans.

14. ME. REV. STAT. tit. 9B, § 331(2) (1975).

15. *Id.* § 334.

16. *Id.* § 339 (Supp. 1977).

Maryland allows branches anywhere within the state,¹⁷ as does Rhode Island.¹⁸ Vermont permits banks to establish "agencies and branches for the general transaction of its business," provided the commissioner finds any such branch will "promote the general good of the state."¹⁹ A 1971 amendment provides for seasonal branches for a stated period of less than a calendar year in any nonurban area.

Statewide Branching States with Capital and Surplus Requirements

There are eight states which allow statewide branch banking with the only restriction being placed on the capital and surplus requirements. These capital requirements are the least restrictive of any of the state branching restrictions in that they have little effect in deterring statewide branch banking.

These capital and surplus requirements are placed on the principal bank and/or on the branch itself. Capital requirements are based on: (1) the paid-in capital and surplus of the main bank, and (2) the minimum capital per branch bank. One state, North Carolina, has capital and reserve requirements which vary with the population of the town and city in which the branch is established.

TABLE 3

*Statewide Branching States
Capital and Surplus Requirements*

Comments

Alaska	Capital at least \$50,000, plus \$25,000 for each branch.
California	(1) If branch is in the same city where the main office is located or where another branch of the bank has been established, capital requirement of \$50,000 for the branch. (2) Elsewhere, capital requirements are the same as for a regular bank. If the only business of branch will be involving trusts then capital requirement is \$50,000.
Delaware	Extra capital of \$25,000 and surplus of \$25,000 for each branch.

17. MD. ANN. CODE art. 11, § 65 (1957).

18. R.I. GEN. LAWS § 19-1-13 (1939), § 19-2-23 (1956) (for savings banks).

19. VT. STAT. ANN. tit. 8, § 651 (1969).

Idaho	Principal bank must have a least \$100,000 in capital stock plus surplus fund (paid-in or earned) of at least 20% of its capital stock. In addition, it must have capital stock of \$25,000 for each branch office.												
Nevada	No requirements for branches inside the state. Principal bank must have capital and surplus over \$1,000,000 to open branch in foreign countries, or United States dependencies or singular possessions.												
New Jersey	Extra capital and surplus of \$100,000 for each branch.												
North Carolina	Capital stock plus unimpaired surplus of \$100,000 necessary for principal bank <i>plus</i> an amount for each branch which varies with the population of branch town: <table> <tr> <th><i>Population</i></th><th><i>Capital</i></th></tr> <tr> <td><3,000</td><td>>\$100,000</td></tr> <tr> <td>3,000 - 10,000</td><td>>\$150,000</td></tr> <tr> <td>10,000 - 25,000</td><td>>\$200,000</td></tr> <tr> <td>25,000 - 50,000</td><td>>\$250,000</td></tr> <tr> <td>>50,000</td><td>>\$300,000</td></tr> </table>	<i>Population</i>	<i>Capital</i>	<3,000	>\$100,000	3,000 - 10,000	>\$150,000	10,000 - 25,000	>\$200,000	25,000 - 50,000	>\$250,000	>50,000	>\$300,000
<i>Population</i>	<i>Capital</i>												
<3,000	>\$100,000												
3,000 - 10,000	>\$150,000												
10,000 - 25,000	>\$200,000												
25,000 - 50,000	>\$250,000												
>50,000	>\$300,000												
South Carolina	For each branch, a total unimpaired capital of \$25,000 above minimum required for principal bank.												

Alaska permits statewide branching if there is a finding that the addition of the proposed facilities "is not detrimental to a sound banking system."²⁰

California permits one or more branches within the state.²¹ The minimum paid-up capital for a first branch in a city not the bank's home office city is equal to what would be required for a new bank in such city under section 308 of the California Financial Code: \$50,000 for towns of less than 10,000 population, \$100,000 for cities

20. ALASKA STAT. § 06.05.415(1) (1951). ALASKA STAT. § 06.15.290 (1951) provides for branches for mutual savings banks.

21. CAL. FIN. CODE § 500 (West 1968).

between 10,000 and 50,000 population, \$200,000 for cities between 50,000 and 200,000 population, and \$300,000 for cities over 200,000 population.²² California permits the establishment of foreign branches provided "[t]he total investment in all foreign branches shall not exceed 10 percent of its capital and surplus."²³

The Delaware statute authorizes branch offices within the state and seems to require extra paid-in capital stock of at least \$25,000 and extra surplus of at least \$25,000 for each branch office.²⁴

Idaho permits branch offices within the state with some capital and surplus requirements and also requires that any principal bank opening a new branch bank or branch office have a capital stock "not less than the minimum capital stock now required by subsections (c) and (d) of section 36 of title 12 of the United States Code . . . for a national banking association establishing and operating new branches outside the city, town or village in which such association is situated."²⁵ A new section was added in 1976 permitting unmanned or manned customer bank communication terminals (CBCT), and providing that use of such terminals "does not constitute branch banking."²⁶

Nevada permits statewide branching, "but the location of the principal office and the parent bank shall be within the State of Nevada."²⁷ Prior to 1969, New Jersey limited branching to the same county as the location of the bank's principal office and provided protection to a bank's principal office by limiting branches of other banks to locations in the same city. The 1969 amendments created three zones in the state, with limited branching within each zone. Further amendments in 1973 eliminated the zones and phased in an almost unlimited statewide branching system by January 1, 1977, when home-office protection was limited to towns of less than 10,000 population. Additional capital and surplus of \$100,000 for each branch is required.²⁸ A 1975 amendment changed the terminology of branch office to "full branch office," and created two additional

22. *Id.* § 502 (referring to CAL. FIN. CODE § 380 (West 1968)).

23. *Id.* § 535.

24. DEL. CODE tit. 5, § 770 (1975).

25. IDAHO CODE § 26-1001 (1967).

26. *Id.* § 26-1018.

27. NEV. REV. STAT. § 660.015 (1971). The restrictions on foreign branches is contained at *id.* § 660.035.

28. N.J. STAT. ANN. § 17:9A-19 (West Supp. 1978-1979). An early assessment of New Jersey's transition to statewide branching is given in Baker, *State Branch Bank Barriers and Future Shock—Will the Walls Come Tumbling Down?*, 91 BANKING L.J. 119, 125-28 (1974).

entities: "minibranch" and "terminal branch."²⁹

North Carolina permits banks to "establish branches or teller's windows in the cities or towns in which they are located, or elsewhere"³⁰ A teller's window is a place in which no loans or investments for the bank are made and at which only the functions and duties of a bank teller are performed. Upon meeting the additional capital requirements, a teller's window may be established in a small community having no other banking facilities. Under some circumstances, the state Commissioner of Banks may waive the additional capital requirements for teller's windows in the same city as the principal bank or within two miles of that city. A 1975 amendment authorized customer-bank communications terminals, point-of-sale terminals, automated teller machines, automated banking facilities and other devices and provided that they would not be deemed a branch or a teller's window and not be subject to additional capital requirements.

The South Carolina State Board of Bank Control must approve any branch of a bank or state building and loan association.³¹ To establish a branch, the parent bank must have paid in total unimpaired capital of at least \$25,000 per branch above what it would need for its own capital requirements.³² Those requirements for principal banks are: \$25,000—in cities and towns with less than 3,000 population; \$50,000—in cities between 3,000 and 10,000 population; \$100,000—in cities over 10,000 population.³³ In addition, the parent must have the same aggregate of capital stock and surplus which would be required if the parent and all branches were independent banks.

LIMITED BRANCH BANKING

The second, broad category of states are those which permit limited branch banking. The statutes in these states often restrict branching to a relatively small geographic area. The branching area is usually defined relative to the town or city limits or county borders. Other states limit branches according to the population of the

29. N.J. STAT. ANN. § 17:9A-20 (West Supp. 1978-1979).

30. N.C. GEN. STAT. § 53-62 (1975).

31. S.C. CODE § 34-1-70 (1976). This provision apparently allows statewide branching unrestricted except for capital requirements.

32. *Id.* § 34-9-50.

33. *Id.* § 34-9-40.

branch city. A few states have additional restrictions on the total number of branches a bank may have. Some states have principal office and/or branch office protection rules. A "home-office protection" would prohibit the establishment of a branch in the same town or city where another national or state bank has its principal office. We first examine the nine states which have home-office protection.

Limitations by Home-Office Protection

TABLE 4

Limited Branch Banking States
Branch Prohibited in Same Town or City
As Another National Or State Bank

Comments

Connecticut	Limited home office protection. Any parent bank with capital and surplus of over \$1,000,000 may open one or more branches within its own town. To branch into a town which is the home office of another bank (state or national) additional capital may be required.
Indiana	For Marion County (Indianapolis) banks: Unlimited branches allowed within any city or town within the county. For banks in all other counties: Branches allowed within any city or town within the county provided: a) no bank or trust company is located there, and b) parent bank has capital and surplus of \$200,000 for each branch.
Iowa	Bank "offices" permitted but with home-office and branch-office protection. Permitted only in county where home office is located or county contiguous to or cornering upon it. Maximum number limited by population:

Under 100,000 population — 2 offices
100,000 - 200,000 population — 3 offices
Over 200,000 population — 4 offices

New York

Home-office protection for communities of less than 50,000 population, otherwise unrestricted statewide branching. Additional capital for each branch of \$50,000 (towns under 30,000 population) or \$100,000 (towns over 30,000 population).

North Dakota

Limited-service "paying and receiving stations" subject to home-office protection. Branching permitted within same or adjoining county, or in any other county if within 35 miles of home bank.

Oregon

Home-office and branch-office protection for towns and cities of less than 50,000 population. Total capital and surplus for principal bank must be greater than \$1,000,000 plus enough so that aggregate is equal to total sum required for unit banks in both locations. Otherwise branching within same county or tributary trade area of principal bank as determined by the superintendent of banking.

South Dakota

No new branches after July 1, 1969. Home-office and branch-office protection. No branch operated in any town after any state or national bank has received authority to operate there. No branch in any town of less than 3,000 population if an existing bank transacts business there. No branch in any town of 3,000 to 15,000 population if two or more banks transact business there. Capital requirements — aggregate must be above that necessary for parent and all branches independently, in any case over \$100,000.

Utah	Home-office protection: no branch in town where state or national bank located. Bank with capital and surplus of over \$60,000 permitted one branch without extra capital; extra \$60,000 required for each additional branch.
Wisconsin	Branching permitted only in another municipality, with home-office protections; only within same county or within contiguous county if within 35 miles of home bank.

Before 1969, Connecticut allowed the state banks with a combined capital and surplus of over \$1,000,000 to branch.³⁴ A bank which qualified could open one or more branches within its own town, apparently without additional capital requirements. If a bank wished to branch into other towns, it met with some limited "home-office protection." If the branch town was the main office of another bank, state or national, then the parent had to have an excess capital and surplus, over its own \$1,000,000, which would be necessary to establish a new bank there. Amendments since 1969 have changed the formula for capital to allow for branching into the home-office towns of others, "provided the capital and surplus of such state bank and trust company is in excess of \$1,000,000." While the intent may have been to retain some degree of home-office protection, the language "of such state bank" can be read to mean that now state banks with capital and surplus of over \$1,000,000 enjoy unlimited statewide branching and without any additional capital requirements. Under this view, Connecticut should be listed in the first broad category of states, at least for larger banks. Connecticut banks with less than \$1,000,000 in capital plus surplus are limited in the number of branches they may establish.³⁵ An older Attorney General's Opinion prohibits mobile units.³⁶

Indiana now permits branches within the same county as the parent bank, subject to home-office protection and capital requirements. Marion County banks are excepted from the home-office

34. CONN. GEN. STAT. ANN. § 36-59 (West 1969).

35. See Table 5 *infra*.

36. 27 OP. CONN. ATT'Y GEN. 33 (Feb. 23, 1951).

protection and capital requirements by a formulation which only Marion County fits: all counties having a population in excess of 500,000 and not having three or more cities of the second class.³⁷ Amendments in 1971 removed the last of the requirements relating to minimum distance between banks.

Iowa declares it does not have branch banking: "No bank shall open or maintain a branch bank."³⁸ Instead, banks are permitted to have "bank offices." Before 1972, these offices could be "for the sole and only purpose of receiving deposits and paying checks and performing such other clerical and routine duties not inconsistent with this section,"³⁹ subject to home-office protection and only within the same counties and counties touching or cornering on the home county. In addition, up to two "parking lot offices" were permitted, with somewhat broader powers.

The 1972 amendments kept the prohibition against branch banks, but broadened the permissible functions of bank offices. They "may furnish all banking services ordinarily furnished to customers and depositors at the principal place of business of the state bank."⁴⁰ Principal record-keeping must be done only at the main bank. The previous geographical limitation was retained and offices are permitted only within county and counties contiguous to or cornering upon it. Bank offices are permitted only within municipalities and not where there is already a state or national bank or its office. In addition to adding the "branch-office protection," a sliding scale of number of offices according to population was added.⁴¹ The "parking lot office" concept was deleted, except that a facility in close proximity to the bank might not count as one of the allowable number of offices. Satellite terminals are not offices, are not subject to any of the restrictions upon offices, and may be placed anywhere in the state.⁴² In 1976, the Iowa legislature added detailed provisions for electronic transfers of funds.⁴³

New York has been progressively liberalizing its branching laws since 1898. In 1934, the state was divided into nine districts, and banks could branch within their districts. Legislation passed in 1971

37. IND. CODE ANN. § 28-1-17-1 (Burns 1973).

38. IOWA CODE ANN. § 524.1201 (West 1970).

39. *Id.*

40. *Id.* § 524.1201 (West Supp. 1978-1979).

41. *Id.* § 524.1202.

42. *Id.* § 524.1212.

43. *Id.* §§ 527.1-.12.

was designed to take effect in stages and achieve a system by January 1, 1976 very close to statewide branching. Retained is home-office protection based upon population: "in no event shall a branch be opened and occupied . . . in a city or village with a population of fifty thousand or less in which is already located the principal office of another bank, trust company or national banking association" ⁴⁴ For each branch, the main bank must have additional capital stock necessary for a new bank in the branch city: \$50,000 in towns under 30,000 population and \$100,000 in towns over 30,000 population. ⁴⁵ A 1975 amendment on electronic facilities permits automated teller machines, point-of-sale terminals, and similar facilities, and declares that they "shall be deemed branches and subject to all the provisions of this chapter applicable to branches [except for the amount of the Banking Department's investigation fee]." ⁴⁶ If these remaining restrictions are viewed as minor, then New York now has statewide branching. ⁴⁷ Branching into foreign countries is permitted. Speaking in 1973, the First Deputy Superintendent of Banks for New York said:

During the past three years, the overseas assets of New York State-chartered banks have grown from less than \$5 billion to more than \$15 billion. Some of the larger state-chartered institutions now have almost 50 percent of their deposits abroad and derive almost 50 percent of their earnings from their overseas operation.

In view of this overseas expansion, the State Banking Department has determined that to comply with its statutory requirements for bank supervision, the annual examination cannot be limited to just the New York office. We recently sent a team of our ablest bank examiners to London, Paris, Frankfurt, Brussels, Munich, and Amsterdam to examine the overseas assets of state-chartered banks. To assure that our examiners are knowledgeable in foreign banking practices, languages, and customs, and that our overseas examinations are conducted as efficiently and economically as possible, we are

44. N.Y. BANKING LAW § 105.1 (McKinney Supp. 1977-1978).

45. *Id.* § 4001.3(a) (McKinney 1971), § 105.2(b) (McKinney Supp. 1977-1978).

46. *Id.* § 105-a (McKinney Supp. 1977-1978).

47. See Vestner, *Trends and Developments in State Regulation of Banks*, 90 BANKING L.J. 464 (1973) [hereinafter cited as Vestner]; Verkuil, *supra* note 1, at 1363 n.91.

also proposing to establish a permanent European district office.⁴⁸

North Dakota expressly prohibits "the maintenance or operation of a branch bank."⁴⁹ There are two deviations from this policy: drive-in facilities and "paying and receiving stations." Every bank may have no more than "one facility for drive-in and walk-up service" subject to geographic and service limitations. It must be located either within the same municipality or may be within three miles of it if not within any other municipality. The services provided are limited to "receiving deposits of every kind and nature, cashing checks or orders to pay, issuing exchange, and receiving payments payable at the bank."⁵⁰

North Dakota banks may establish "paying and receiving stations" subject to service, geographical, and home-office restrictions. The only services permitted at stations are "receiving and paying out deposits, issuing drafts, travelers' checks, and similar instruments, handling and making collections, and cashing checks and drafts."⁵¹ The station may be in any city or town "not having an established banking institution located therein." The station may be within the same county or in any adjoining county or in any other county if it is within 35 miles of the home bank.⁵²

Oregon has home-office and branch-office protection for "any city, town, village or community of less than 50,000 population where there is a national or state bank regularly transacting a banking business"⁵³ Otherwise, one or more branches may be established within the same county or within "the tributary trade area."⁵⁴ In any case, the parent bank must have capital of over \$1,000,000 *plus* enough so that the aggregate is equal to the total required if parent and all branches were unit banks. That has been a uniform \$200,000 per bank, since a 1973 amendment effective January 1, 1974.⁵⁵

48. Vestner, *supra* note 47, at 474.

49. N.D. CENT. CODE § 6-03-13.4 (1975).

50. *Id.* § 6-03-13.1.

51. *Id.* § 6-30-17.

52. *Id.* § 6-03-14. The section concludes: "This section shall not be construed as committing this state in any manner to a policy of permitting branch banking." If the essence of banking is receiving deposits and cashing checks, then North Dakota permits limited branch banking. If the essence of banking is making loans, then North Dakota is a unit banking state.

53. OR. REV. STAT. § 714.050 (1977). An exception is made for mergers.

54. *Id.* § 714.060.

55. *Id.* § 707.050.

Oregon banks which have capital and surplus over \$1,000,000 and are members of the Federal Reserve System may establish branches in foreign countries and United States dependencies and insular possessions. However, they may not invest over 10% of their capital and surplus in the corporate stock of such branches.⁵⁶ A 1975 law added Customer-Bank Communication Terminals (CBCT's) as a permissible installation on the premises of a bank or branch, or off the premises if unmanned.⁵⁷

South Dakota is moving away from branching. South Dakota law provides that "[n]o charter for any branch office shall be granted after July 1, 1969, but all existing branch offices may continue to operate as authorized by their respective charters."⁵⁸ Nevertheless, no branch office shall be operated in any town after any state or national bank has received authority to operate there. Apparently this home-office protection could close existing branches. The previous branch office protection provided that no branches could be established, other than banks acquired by purchase or consolidation, in any town of less than 3,000 population where there was existing a national or state bank regularly transacting banking business, or in any town between 3,000 and 15,000 population where two or more such banks were regularly transacting banking business.⁵⁹

The parent bank must maintain paid-in and unimpaired capital above whatever aggregate would be necessary if it and its branches were independent banks and in any event over \$100,000.⁶⁰ The capital stock of banks is a minimum of \$50,000 in towns and cities less than 5,000 population and \$100,000 in towns and cities over 5,000 population.⁶¹

Each bank and branch may have one "detached drive-in facility,"⁶² but with some maximum distance requirements. In cities of 15,000 population or more, the facility must be within 300 feet of the main building and closer to the main building than to any other

56. *Id.* § 714.140.

57. *Id.* §§ 714.210, 714.220.

58. S.D. COMPILED LAWS ANN. § 51-20-1 (Supp. 1978).

59. *Id.* § 51-8-1 (1967) (repealed 1969).

60. *Id.* § 51-20-3 (Supp. 1978).

61. *Id.* § 51-17-4.

62. *Id.* § 51-20-6. The facility is "detached" if any point of the structure of the facility is more than fifty feet from the building containing the main banking room of the bank. *Id.* § 51-20-7. These facilities are not available to banks with a branch in its own town. *Id.* § 51-20-10. The services of these facilities must be limited to "services comparable to those customarily performed by a bank teller in a bank." *Id.* § 51-20-11.

bank, or its branch, or its detached drive-in facility. Similarly, in cities of less than 15,000 population, the facility must be closer to the main building than to any other bank and in any case not closer than 1,000 feet from another bank or its branch, or its detached facility.⁶³

In addition, South Dakota permits "remote service units" anywhere within the state.⁶⁴ These units may be any manned or unmanned device through, or by means of which, information relating to banking services rendered to the public is stored and transmitted to a bank.

Utah prohibited branches until 1933, an unusual year for a state to *begin* with experiments in branch banking. A branch is broadly defined as anyplace "at which deposits are received or checks paid or money lent." Except for cities of over 100,000 population and the unincorporated areas of their counties, there is home-office protection. According to the Utah Code, "no branch bank shall be established in any city or town in which is located a bank or banks, state or national, regularly transacting a customary banking business" (except by purchase of an existing unit bank in operation 5 years).⁶⁵ Utah is considering various "consumer fund transfer facilities," including automated teller machines and point-of-sale terminals. Meanwhile, a 1977 amendment expressly forbids all such facilities before July 1, 1979.⁶⁶

Until 1957, Wisconsin was a unit banking state. The Wisconsin statute provided that "no bank shall establish more than one office of deposit and discount or establish branch offices, branch banks or bank stations . . ."⁶⁷ A 1957 amendment allowed the minor liberalization that a bank could establish a "bank station" with two limitations. First, the station could only "receive deposits, permit withdrawals, issue cashiers' checks, money orders, drafts and travelers' checks and provide safekeeping and safety deposit services." Second, such a bank station could only be in a "town completely surrounded by outlying waters and having no bank or place where such banking may be done in the town or readily accessible to all persons

63. *Id.* §§ 51-20-8, -9.

64. *Id.* §§ 51-20A-1, -2. These units "are not branch banks or branch offices." *Id.* § 51-20A-5.

65. UTAH CODE ANN. § 7-3-6 (1971).

66. *Id.* §§ 7-16-1 to -6 (Supp. 1977).

67. WIS. STAT. ANN. § 221.04(1)(f) (West Supp. 1978-1979).

of the town desiring the service.”⁶⁸

A broader 1967 amendment placed Wisconsin among the limited branch banking states. A branch bank may be established in another municipality if there is no bank or branch bank in that municipality or within three miles of the branch site. In any event, the branch must be within the same county, or it may be within a contiguous county, if it is within 25 miles of the home office.⁶⁹

New Jersey has retained the home-office protection for towns of less than 10,000 population, as discussed above under *Table 3*. A type of “home-office protection” is still part of the Louisiana system and is discussed in the next section.

Limitations by Number of Branches Permitted

TABLE 5

Limited Branch Banking States Number of Branching Facilities Restricted

Restriction

Connecticut	Banks with capital and surplus of \$500,000 to \$1,000,000 may not have more than 2 branches. Banks with capital and surplus of \$250,000 to \$500,000 may not have more than 3 “limited power branches.”
Hawaii	No branches outside district of Honolulu. That district divided into 3 zones. A bank may have not more than 4 branches in each zone.
Louisiana	Unlimited branching within parish of domicile. Outside parish of domicile, branching permitted only for banks with capital over \$100,000, only in parishes in which there are no state banks, savings banks, or trust companies, and then only one branch per such parish is permitted.

68. *Id.* § 221.04(1)(i).

69. *Id.* § 221.04(1)(j).

Mississippi

Branch *offices* (without additional capital requirements) permitted, without restriction on number, 1) in same city, if over 10,000 population; 2) within same county; 3) within any county adjacent; Except — not in any town less than 3,500 population if it has a bank or branch bank in operation.

Branch *banks* permitted, subject to additional capital requirements and 1) must be within 100 miles of parent bank, but 2) no more than 15, and 3) none in a town with less than 3,100 population.

The statewide branching possibilities for Connecticut banks were discussed in the previous section.

Hawaii banks are permitted up to twelve branches within the district of Honolulu.⁷⁰ Any bank with capital and surplus over \$1,000,000 may establish branches in foreign countries or United States dependencies or insular possessions. The total investment in all such "out-of-state branch banks" may not exceed 10% of the bank's capital and surplus.⁷¹

Before the amendments of 1976, Louisiana allowed a new bank with capital stock of over \$50,000 to begin with only two branches, provided they were within the parish of domicile of the bank.⁷² Subsequently, a bank could open more branches within its parish of domicile, limited only by a sliding scale based upon its capital:

\$ 50,000 - \$ 75,000 — 2 branches
\$ 75,000 - \$100,000 — 3 branches
\$100,000 - \$200,000 — 5 branches
\$200,000 - \$250,000 — 6 branches
\$250,000 - \$300,000 — 7 branches
each additional \$100,000 — one additional branch⁷³

70. HAW. REV. STAT. § 403-53 (1976).

71. *Id.* § 403-54.

72. LA. REV. STAT. ANN. § 6:244 (West 1951) (The section was amended in 1976 by deleting two sentences. See *id.* § 6:244 (West Supp. 1978)).

73. *Id.* § 6:328 (West Supp. 1978).

With these capital limitations removed in 1976, there is now unlimited same-parish branching. The restrictions on branching outside the parish of domicile were left intact.⁷⁴ Thus, capital of \$100,000 or more is required to branch outside the parish, branching is permitted only into parishes in which there are no state banks, savings banks, or trust companies, and only one branch in each qualifying parish is permitted. Banks with capital and surplus over \$1,000,000 may open branches in foreign countries.⁷⁵

Mississippi draws a distinction between "branch offices" and "branch banks" but without defining either term except that branch offices may make loans and keep the resulting notes and collateral at the branch office of origin. Without any limitations of additional capital requirements, banks are unlimited in how many branches they may request from the state comptroller within their city of domicile (if over 10,000 population), within their county of domicile, or within any adjacent county. The one exception is in towns under 3,500 population which already have a bank or branch bank.⁷⁶ On the other hand, branch banks are limited to a maximum of 15 branches in number, they must be within 100 miles of the parent bank, and cannot be in towns of under 3,100 population according to the last preceding federal census.⁷⁷ For a bank to branch, it must have capital of \$100,000 plus an additional amount for each branch equal to that which would be required if the branch were a unit bank where located.⁷⁸ Unit bank minimum capital requirements are based upon population:

Under 6,000 population	— \$ 50,000
6,000 to 10,000 population	— \$ 75,000
Over 10,000 population	— \$100,000 ⁷⁹

The Mississippi statute contains a strong denunciation of any participation in "group banking systems" or "chain banking systems."⁸⁰

The South Dakota system was described in the previous section.

74. *Id.* § 6:54 (West 1951).

75. *Id.* § 6:56.

76. MISS. CODE ANN. § 81-7-5 (1966).

77. *Id.* § 81-7-7.

78. *Id.* § 81-7-9.

79. *Id.* § 81-3-11.

80. *Id.* § 81-7-19.

It could be viewed as one which limits the number of branches available to banks.

Limitations by Population

The third type of limitation is based upon the population of the city where the branch is to be located.

TABLE 6

Limited Branch Banking States Number of Branching Facilities Limited by Population

Georgia	No branches outside same county (minor exception for Atlanta branches). Within same county, number of branches based upon population of county: up to 7 in the population range 100,000 to 120,000 and no limit over 120,000.
Mississippi	Branch "offices" permitted in county or county adjacent, but 1) in same town only if over 1,000 population, and 2) not in town less than 3,500 if it has bank. Up to 15 branch "banks" permitted if within 100 miles of parent, but not in towns less than 3,100 population.
New York	Cities and towns of less than 50,000 population still have home-office protection. Otherwise, state-wide branching.
Oregon	Home-office and branch office protection for cities and towns less than 50,000 population. Otherwise, county-wide branching.

Georgia defines three distinct types of branches: branch bank—"any additional *principal* place of business of any parent bank located in a county *other* than in the county wherein the parent bank is chartered and is situated"; branch office—"any additional place of business of a parent bank or a branch bank located in the *same* county in which said parent bank or branch is situated and which has obtained a permit to operate a *complete* banking service"; bank facility—"any additional place of business of a par-

ent bank or branch bank located in the *same* county in which said parent bank or branch bank is situated and which has obtained a permit to operate a *limited* banking service.”⁸¹

Before 1970, branching into other counties (“branch banks”) was frozen to existing branches: “No new or additional branch bank as defined in section 13-201.1(b) [of the Georgia Code] shall be established.”⁸² Technical amendments of 1970 and 1975 allowed an exception for banks in Atlanta, which is situated in two counties, Fulton and DeKalb. Such banks can establish a branch in the other of the two counties.⁸³ With this exception plus any existing grandfather branches, Georgia has county-wide branching only, based upon population. Georgia banks may obtain permission for same-county “bank offices” or same-county “bank facilities” with the following county population limitations:⁸⁴

<i>Population</i>	<i>Total of bank offices and bank facilities</i>
less than 20,000	2
20,000 to 40,000	3
40,001 to 60,000	4
60,001 to 80,000	5
80,001 to 100,000	6
100,001 to 120,000	7
over 120,000	no limit

Prior to 1973, a “drive-in facility” was permitted and not considered a “branch bank,” a “bank office,” or a “bank facility,” but rather as an “expansion or extension of the existing banking place of business,” provided: 1) it was within the boundary lines of a single contiguous area of property owned or leased and occupied by the bank, its branch, or bank office, or 2) it was across a street, alley, or railroad from the bank, or branch, or office and “physically connected to the banking house by a private, enclosed, secure overhead passageway or underground tunnel.”⁸⁵ A 1973 amendment deleted the designation of “drive-in” and added a third qualifying test: it could be within 200 yards of the bank, branch bank, bank office, or

81. GA. CODE ANN. § 13-201.1 (Supp. 1978) (emphasis added).

82. *Id.* § 13-203(c).

83. 1970 Ga. Laws Nos. 954, 957; 1975 Ga. Laws Nos. 474, 475.

84. GA. CODE ANN. § 13-203.1(c)(2) (Supp. 1978).

85. *Id.* § 13-203.2.

bank facility.⁸⁶ A 1975 amendment also allows the commissioner to approve unmanned automated tellers or unmanned point-of-sale terminals.⁸⁷

Mississippi's system was discussed above under *Table 5*, where it was pointed out that branches there are limited by number. In addition to Mississippi's three population restrictions pertinent in this section Mississippi will also be listed in the next section on the restriction of branches to the same county.

New York's new system after January 1, 1976 was discussed above under *Table 4* on "home-office protections." The new system retains that protection only for cities or towns with a population of 50,000 or less. Cities over 50,000 population may now be the arena for statewide branching.

Oregon, discussed above under *Table 4* on home-office protection, limits that protection to cities and towns with a population of less than 50,000. In cities over 50,000 population, there is county-wide branching.

Limitations to Same County

The fourth type of limitation is an area limitation: branching is permitted only within the same county as the parent bank's location. A few states also allow branching into an adjacent county.

TABLE 7

Limited Branch Banking States Branch Must Be Within Same County

Alabama	County-wide branching only in those counties designated from time to time by legislature.
Arkansas	Full service branch office permitted 1) within same city or town, but not closer than 300 feet to main office of another bank, and 2) in any other city, town, or planned community with population over 250 and within same county, provided no other bank has main office there.

86. *Id.* § 12-203.2(c).

87. *Id.* § 12-203.2(d).

Florida	Up to two branches per calendar year within same county. In addition, branches by merger within same county. "Facilities" for customers permitted if on premises or contiguous premises. Also permitted, one drive-in and walk-up facility within one mile.
Georgia	Minor exception for banks in Atlanta. Otherwise, branches permitted only within same county based upon population.
Indiana	Indianapolis bank can branch within its county. Banks of all other counties can branch within their counties subject to home-office protection and capital and surplus requirements of \$200,000.
Iowa	Branching permitted in same county, county adjacent, or county cornering upon principal bank's county, with home-office and branch office protection.
Kentucky	Branches permitted in another city subject to home-office protection. Capital and surplus necessary for each branch based upon population of city of main bank: less than 8,000 population — \$100,000 8,000 - 19,999 population — \$200,000 over 19,999 population — \$250,000
Louisiana	Unlimited branching within parish, restricted possibility for a branch outside parish.
Massachusetts	Banks may branch within same city or town or into any other city or town within same county. Savings banks, co-operative banks, and trust companies limited by home-office and branch office protections. Savings banks and co-operative banks may branch within 15 miles, even if into another county.

Michigan	Branching permitted within own city or village and within another city or village, subject to home-office and branch-office protection: 1) within same county; 2) within 25 miles of parent bank; 3) over 25 miles but within contiguous county if that county has no bank.
Mississippi	Branch <i>offices</i> permitted within same county or county adjacent but home-office and branch-office protections for towns under 3,500 population. Branch <i>banks</i> permitted anywhere within 100 miles but no more than 15 and none in towns under 3,000 population.
New Mexico	Branching permitted within same county, or within adjoining county, if no bank in operation in that county or, within 100 miles of parent bank, if no bank in operation in county of branch.
North Dakota	Branching permitted within same or adjoining county or in any other county if within 35 miles of home bank, subject to home-office protection; however, only limited service "stations" permitted.
Ohio	Branching permitted within the county of its municipality. Extra \$100,000 in capital and surplus required for each branch.
Oregon	Branching permitted within same county or tributary trade area. Home-office and branch-office protections for towns under 50,000 population.
Pennsylvania	Branching permitted within same county or county contiguous.
Tennessee	Branching permitted within same county.

Virginia	Branching permitted within county, if parent bank has capital and surplus over \$50,000.
Wisconsin	Branching permitted within same county or within contiguous county if within 25 miles of home bank. Branching in another municipality subject to home-office and branch-office protection.

The current Alabama statute on branching provides:

No bank, or any officer, agent or director hereof, shall be permitted to establish a branch or office for the transaction of the banking business other than at its principal place of business, in any county in this state, except as has been heretofore or which may hereafter be provided by local laws or general laws of local application.⁸⁸

Between 1896 and 1911, the Alabama Code expressly provided for multi-county branch banking, but since 1911, the legislature has designated which counties may have branching, and then only permitting branching within the county.⁸⁹ Several attempts by the legislature to make such a designation have thus far been found constitutionally defective.⁹⁰

Under 1973 legislation, fully effective since March 5, 1976, Arkansas allows county-wide branching into any other city, town, or "planned community" (over 5,000 acres), with over 250 population but with home-office protection. The units are termed "full service branch offices."⁹¹ The 1975 legislature found that the provisions

restricting the establishment of branch banking facilities to incorporated cities and towns having a population of 250 or more are unreasonably restrictive and create a hardship on many citizens and residents of reasonably populated areas in

88. ALA. CODE § 5-1-19 (1977). Prior to this revision, this provision was ALA. CODE tit. 5, § 125 (1975), dating back to 1955.

89. *Security Trust & Sav. Bank v. Marion County Banking Co.*, 287 Ala. 507, 253 So. 2d 17 (1971).

90. *See Traders & Farmers Bank v. Central Bank*, 294 Ala. 622, 320 So. 2d 638 (1975) (Winston County).

91. ARK. STAT. ANN. § 67-360 (Supp. 1977).

the state where there are no convenient banking facilities
 '92

The legislature thus amended the statutes to allow a bank to establish a branch in any county of between 34,000 and 39,000 population if the branch was at least 10 miles, but not more than 15 miles, from the parent bank.⁹³

Florida passed a "Regulatory Reform Act of 1976," effective on June 17th of that year. That act repealed all the statutes underlying a wide range of regulatory bodies of the state. While for some agencies the act repealed the statutes as of July 1, 1978, the statutes on the regulation of banks and some other industries are repealed as of July 1, 1980. The Act establishes a series of legislative review committees, each to begin work one year prior to repeal date and to provide a recommendation by the February 15th prior to the date of repeal. As to each statute, the committee is to recommend continuation, modification, or repeal of the regulation.⁹⁴ Thus, it is possi-

92. 1975 Ark. Acts No. 396, § 3.

93. ARK. STAT. ANN. § 67-366 (Supp. 1977).

94. FLA. STAT. ANN. § 11.61 (West Supp. 1978). The language of the act shows its purpose:

(2) It is the intent of the legislature:

(a) That no profession, occupation, business, industry, or other endeavor shall be subject to the state's regulatory power unless the exercise of such power is necessary to protect the public health, safety, or welfare from significant and discernible harm or damage. The exercise of the state's police power shall be done only to the extent necessary for that purpose.

(b) That the state shall not regulate a profession, occupation, industry, business, or other endeavor in a manner which will unreasonably adversely affect the competitive market.

(c) To provide systematic legislative review of the need for, and the public benefits derived from, a program or function which licenses or otherwise regulates the initial entry into a profession, occupation, business, industry, or other endeavor by a periodic review and termination, modification, or reestablishment of such programs and functions.

.
 (4) In determining whether to reestablish a program or function, the Legislature shall consider the following criteria:

(a) Would the absence of regulation significantly harm or endanger the public health, safety, or welfare?

(b) Is there a reasonable relationship between the exercise of the state's police power and the protection of the public health, safety, or welfare?

(c) Is there another, less restrictive method of regulation available which could adequately protect the public?

(d) Does the regulation have the effect of directly or indirectly increasing the costs of any goods or services involved, and, if so, to what degree?

(e) Is the increase in cost more harmful to the public than the harm which could result from the absence of regulation?

ble to describe only the Florida system of regulation of branch banking in effect until July 1, 1980.⁹⁵

Prior to 1975, Florida was a unit banking state which allowed only an attached drive-in or walk-up facility. The Florida statute provided that "any bank shall have only one place of doing business . . . and the business of the bank shall be transacted at its banking house . . . and not elsewhere."⁹⁶ The 1975 amendment requires every bank to have "one principal place of doing business" and, if permitted by the Department of Banking and Finance, banks may have "up to two branches per calendar year within the limits of the county in which the parent bank is located and, in addition, may establish branches by merger with other banks located within the county"⁹⁷

In addition to branches, a bank may operate "facilities providing services to customers" if situated on property on which the main banking house is situated or on property contiguous or separated by a street, walkways, or alleyways. Also, such bank may have one "drive-in and walk-up facility" located within one mile but not closer than 400 feet to another bank without its consent.⁹⁸

New 1975 provisions permit any trust company to establish branches within the same county. In addition, a trust company may maintain one or more "trust service offices" at the location of any state or national bank anywhere in the state.⁹⁹ Also new in 1975, a lengthy statute authorized the use of point-of-sale terminals and remote service terminals.¹⁰⁰

In Georgia, the only geographical exception is for banks in Atlanta, which is situated in two counties. Atlanta banks can branch in both counties.¹⁰¹

The Indiana system has a home-office protection, except for banks in Marion County (Indianapolis).¹⁰²

(f) Are all facets of the regulatory process designed solely for the purpose of, and have as their primary effect, the protection of the public?

95. An interesting discussion of chain banking and group banking in Florida a decade ago is provided in Note, *Present Banking Structure in Florida and Branch Banking*, 20 U. FLA. L. REV. 84 (1967).

96. FLA. STAT. ANN. § 659.06 (West Supp. 1978). Prior to 1973, the statute said, "Any bank or trust company." See *id.* § 659.06 (West 1966).

97. *Id.* § 659.06 (West Supp. 1978).

98. *Id.*

99. *Id.* § 659.061.

100. *Id.* § 659.062.

101. See the discussion under Table 6 *supra*.

102. See the discussion under Table 4 *supra*.

Iowa allows full-service bank offices only within the same county but now permits electronic satellite terminals anywhere in the state.¹⁰³

Kentucky branches are permitted within the same county and they can exercise all the powers of the principal bank. No branch can be located in a city, other than the city of the principal bank, if that city has an existing bank.¹⁰⁴

Since 1976, Louisiana has permitted parish-wide branching.¹⁰⁵

Massachusetts varies its limitations on branching according to the type of financial institution.¹⁰⁶ A bank¹⁰⁷ may be authorized to establish "branch offices" in its own city or town or in any other city or town within the same county.¹⁰⁸ Banks of other states and of foreign countries are not permitted to branch into Massachusetts.¹⁰⁹ Since 1966, "mobile branch banking" may be authorized, but only within the same county.¹¹⁰ A savings bank may have one or more "offices or depots" within its own city or town. A savings bank may also branch into any other city or town which is either in the same county or is within 15 miles of its main office but branching is subject to home-office and branch-office protections for other savings banks.¹¹¹

Co-operative banks are limited in a manner identical to savings banks but with the home-office and branch-office protections for other co-operative banks.¹¹² Trust companies may branch within the same city or town or within any other city or town within the county subject to a broad home-office and branch-office protection. Thus,

103. See the discussion under Table 4 *supra*.

104. KY. REV. STAT. ANN. § 287.180 (Baldwin 1976).

105. See the discussion under Table 5 *supra*.

106. See *Chicopee Co-operative Bank v. Board of Bank Incorporation*, 347 Mass. 744, 753-54, 200 N.E.2d 284, 290-91 (1964).

107. Provisions relating to ordinary commercial banks are split between two chapters of Title XXII, chapters 167 and 172A. See MASS. GEN. LAWS ANN. chs. 167, 172A (West 1971 & Supp. 1978-1979).

108. MASS. GEN. LAWS ANN. ch. 172A, § 12 (West Supp. 1978-1979).

109. *Id.* ch. 167, § 37A (added by 1949 Mass. Acts ch. 640).

110. *Id.* ch. 167, § 60.

111. Branching is permitted only into cities or towns "having no main office or branch office of a savings bank." *Id.* ch. 168, § 5 (West 1971). But see *id.* ch. 168, § 5 (West Supp. 1978-1979). Permission to branch outside the county under the 15-mile rule is limited to one per year. A 1976 amendment prevents utilizing the merger-holding company to branch beyond these limits.

112. *Id.* ch. 170, § 12 (West 1971). But see *id.* ch. 168, § 5 (West Supp. 1978-1979). Also identical is the limitation of once per year if within 15 miles but outside the same county, and the bar on using mergers to branch further.

they may branch only into cities having no commercial banking facilities or facilities inadequate for the public convenience.¹¹³

Under Michigan's new Banking Code of 1969, the restriction on branching based upon minimum capital was deleted.¹¹⁴ Branching within a bank's own city or village is not subject to any home-office or branch-office protections. Branching into other cities or villages is subject to these protections.¹¹⁵ New in the 1969 code is the authority to operate "branch facilities" with the limited functions of "selling exchange, cashing checks, receiving deposits and payments on loans." These facilities are subject to all the restrictions on branches plus some additional limitations. The facilities must be in another city or village and then only with a population of *less than* 1,000. They cannot operate within 5 miles of a state or national bank or a branch thereof.¹¹⁶

Generally, Mississippi permits branch "offices" anywhere within the same county or county adjacent.¹¹⁷

New Mexico permits some branching outside the county but subject to home-office and branch-office protections.¹¹⁸ Attached facilities, including those "connected with the main banking premises by subterranean or overhead passageways through which bank personnel may pass" are not considered branches.¹¹⁹

North Dakota allows limited service "paying and receiving stations."¹²⁰

In Ohio, the minimum capital and surplus requirements for banks are \$250,000 for villages and cities under 25,000 population and \$500,000 for cities with a greater population. Each branch requires

113. *Id.* ch. 172, § 11 (West Supp. 1978-1979). Missing here is the new 15-mile rule and the prohibition on evasion through merger. Massachusetts credit unions may branch within the same county without any home-office or branch-office protections. *Id.* ch. 171, § 2.

114. MICH. COMP. LAWS ANN. § 487.471 (Supp. 1978-1979) (repealing MICH. COMP. LAW ANN. § 487.34 (1967)). Also the distinction between banks and trust companies was eliminated. *Id.* § 487.309 (Supp. 1978-1979).

115. *Id.* § 487.471 (Supp. 1978-1979). These protections are discussed in *Tri-City Bank v. State*, 38 Mich. App. 703, 197 N.W.2d 332 (1972). In deciding the definition of a branch bank under Michigan law, the court followed the United States Supreme Court's 1969 decision in *First National Bank v. Dickinson*, 396 U.S. 122 (1969). Some comments on the operation of the Michigan statute are found in Grunewald & Wein, *Establishing a Branch Bank in Michigan*, 19 WAYNE L. REV. 1137 (1973) [hereinafter cited as Grunewald & Wein].

116. MICH. COMP. LAWS ANN. § 487.473 (Supp. 1978-1979).

117. See the discussion under Table 5 *supra*.

118. N.M. STAT. ANN. § 48-2-17 (1966).

119. *Id.* § 48-2-16.

120. See the discussion under Table 4 *supra*.

an additional \$100,000.¹²¹ The county-wide limitation is oddly phrased: "in other parts of the county in which the municipal corporation in which the principal place of business of the bank is located"¹²² The language is designed to deal with the unique situation of the city of Fostoria which is "located" in three Ohio counties. In construing a similar prior version of this statute, the Sixth Circuit held that a bank in Fostoria could branch into any of the three counties, including one in which neither it nor the Fostoria "seat of government" was located.¹²³ One exception to the general rule is that a bank can branch into a municipality which is contiguous to its own. For purposes of this statute, branches do not include schools, hospitals, and firms collecting deposits from their own people, postal and armoured car drop-off locations, nor any facility within 500 yards of a bank or branch.¹²⁴ Branches may be located outside the United States.¹²⁵

Subject to a home-office and branch office protection for cities of less than 50,000 population, Oregon permits branching within the same county or "tributary trade area."¹²⁶

Prior to 1970, Pennsylvania required additional capital and surplus for branches on a scale with population. Now the additional capital and surplus requirements are within the discretion of the Department of Banking.¹²⁷ Since 1965, branches may be established outside the United States.¹²⁸

Tennessee permits branch banks, offices, agencies, and subsidiary corporations but only within the same county.¹²⁹

Virginia permits county-wide branching with a capital and surplus requirement. In addition, the state commission may authorize a branch "in cities contiguous to the county or city in which the parent bank is located, and . . . in counties contiguous to the city in which the parent bank is located."¹³⁰ A state supreme court deci-

121. OHIO REV. CODE ANN. § 1105.102(B)(1)-(2) (Page 1968).

122. *Id.* § 1111.03.

123. Ohio Bank & Sav. Co. v. Tri-County Nat'l Bank, 411 F.2d 801 (6th Cir. 1969).

124. OHIO REV. CODE ANN. § 1101.01(D) (Page 1968).

125. *Id.* § 1111.03(B).

126. See the discussion under Table 4 *supra*.

127. PA. STAT. ANN. tit. 7, § 904(b)(ii) (Purdon 1967 & Supp. 1978-1979).

128. *Id.* § 907.

129. TENN. CODE ANN. § 45-443 (Supp. 1978). Some information about banking in Tennessee, especially in Nashville, is given in Klebaner, *Bank Merger Policy and the Third National Bank Decision*, 22 VAND. L. REV. 531 (1969).

130. VA. CODE § 6.1-39(c) (1973). See amending language at *id.* § 6.1-39(c) (Supp. 1978).

sion construes "contiguous" as being in close physical proximity, but not necessarily touching.¹³¹ A 1976 amendment separately allows a bank or branch to establish a drive-in facility if within 500 feet of the bank or branch. This codified the result in a Fourth Circuit case in which a facility was some 200 feet away and not connected by pneumatic tubes.¹³² Another 1976 amendment authorizes various electronic banking facilities but only "at a location at which the bank might establish a branch,"¹³³ or where a bank "under common control with it" has a branch.¹³⁴ The 1962 legislation has been said to have caused "a dramatic conversion of the state's banking structure from unit banking to branch banking."¹³⁵

Wisconsin allows branching into a contiguous county if the site of the branch is within 25 miles of the home bank.¹³⁶

Limiting Branches to City or Town of Principal Bank

The last major type of limitation on branch banking to be examined is the limiting of branching to the same city or town. Two states utilize this restriction.

TABLE 8

Limited Branch Banking States

Branch Restricted to City or Town of Principal Bank

New Hampshire	One or more branch offices permitted: 1) within same town or 2) within any contiguous town, subject to home-office protection, and 3) within any non-contiguous town within 15 miles if no other home-office is within 10 miles of the branch.
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131. *First Va. Bank v. Commonwealth*, 212 Va. 654, 187 S.E.2d 186 (1972) (contiguous means economically contiguous or compact, not geographically contiguous).

132. *Commonwealth ex rel. State Corp. Comm'n v. Farmers & Merchants Nat'l Bank*, 515 F.2d 154 (4th Cir. 1975), *aff'g* 380 F. Supp. 568 (W.D. Va. 1974), *cert. denied*, 423 U.S. 869 (1976). See VA. CODE § 6.1-39(d) (Supp. 1978).

133. VA. CODE § 6.1-39.1 (Supp. 1978).

134. *Id.* § 6.1-39.2.

135. Ileo & Parcell, *Evolution of the Virginia Banking Structure 1962-1974: The Effects of the Buck-Holland Bill*, 16 WM. & MARY L. REV. 567, 567-68 (1975). The authors provide considerable economic data. A subsequent analysis of the statewide branching through merger and holding companies is given in Parcell, *Banking Structure and Statewide Branching: The Potential for Virginia*, 18 WM. & MARY L. REV. 93 (1976).

136. See the discussion under Table 4 *supra*.

Washington

Branching permitted: 1) within same city or town, and 2) for banks with capital over \$200,000, in any other city or town within county, but with home-office and branch-office protections, and 3) for banks with capital over \$500,000, in any city or town within the state, but with home-office and branch-office protections, and 4) for banks with capital over \$1,000,000, in any foreign country.

New Hampshire defines a "branch office" as "any house, office, separate building, depot, agency, mobile facility or place of business, other than its principal office"¹³⁷ A bank may branch within the same town or under either of two alternative limitations. First, it may branch into any contiguous town which does not have any state or national bank. Second, it may branch into any noncontiguous town within 15 miles of its principal office provided no state or national bank is within 10 miles of the branch.¹³⁸

An anti-concentration provision prohibits approval of a branch to any bank if its total time and demand deposits are greater than 20% of the aggregate time and demand deposits of all state and national banks in New Hampshire.¹³⁹ A 1975 amendment allows electronic devices or machines to be used as follows:

to the same extent and with comparable limitations as:

- (a) national banks operating within this state are permitted under the rules of the comptroller of the currency, or
- (b) federal savings and loan associations operating within this state are permitted under the rules of the Federal Home Loan Bank Board.¹⁴⁰

Washington State statutes provide interlocking considerations of

137. N.H. REV. STAT. ANN. § 384-B:1(III) (1968).

138. *Id.* § 384-B:2(I). The term "contiguous" is construed in *First Fed. Sav. & Loan Ass'n v. State Bd. of Trust Co.*, 109 N.H. 467, 254 A.2d 835 (1969).

139. N.H. REV. STAT. ANN. § 384-B:2(I) (1968). A similar limitation is applied to affiliates of a bank holding company. A bank holding company system is limited to twelve affiliates and to 20% of the time and demand deposits of the aggregate within the state. *Id.* § 384-B:3.

140. *Id.* § 384-B:7 (Supp. 1975). This is a kind of "reverse McFadden Act" situation.

paid-in capital, geographic limitations, and home-office and branch-office protections.¹⁴¹ If capital requirements are of little hinderance and home-office and branch-office protections do not exclude too much of the market, then Washington could be listed as a state-wide branching jurisdiction under *Table 3* above.¹⁴² If the home-office and branch-office protections exclude most of the available market, then Washington does not in fact permit branching.¹⁴³

In the first, broad category of states, those which permit statewide branching, the law of branching was seen to be fairly simple. In most of those jurisdictions, there are no appellate court decisions construing branching statutes. In the second, broad category of states just preceding, those which allow branching but subject to limitations, the statutes tend to be more complex and there are more appellate decisions construing branching statutes.

NO BRANCH BANKING

The third, broad category of states are those which do not permit branch banking. Common to these "unit banking" states is a legislative policy not to allow branching. However, variations are present in the legislative and judicial willingness to bend that policy with auxiliary teller's windows, limited service stations, and detached facilities within fixed distances. These are the states, like Illinois, where the various banking interests still wage their political battles over branch banking in the state legislature.

Texas is the only unit banking state now left which permits only physically attached auxiliary teller windows. There, pneumatic tube systems are deemed sufficient to meet the requirements of physical attachment. The other nine states permit a detached facility of some kind.

141. WASH. REV. CODE ANN. § 30.40.020 (1976).

142. It is so listed by CCH. See note 9 *supra*.

143. This is the conclusion reached in Comment, *Bank Branching in Washington: A Need for Reappraisal*, 48 WASH. L. REV. 611 (1973). The comment also concludes that "the underlying policy of the present statute to allow branching by merger is being frustrated by Justice Department antitrust enforcement." *Id.* at 612.

TABLE 9

No Branch Banking

Colorado	A single "detached facility" per bank is permitted if within 3,000 feet of bank's premises and not closer than 300 feet of another bank or its detached facility.
Illinois	Two drive-in and/or walk-up facilities per bank are permitted; one within 3500 yards of main bank, the other within 1500 feet. None permitted closer than 600 feet from another bank, with some exceptions.
Kansas	One attached auxiliary teller facility permitted. No more than 3 detached facilities are permitted, one must be within 2,600 feet of bank, all must be within same city or township.
Missouri	Two drive-in facilities per bank are permitted, but only within same municipality and not closer than 400 feet of another bank. Outside the wealthiest counties, one facility per bank permitted if within county, within 15 miles of bank, and in a town of less than 1,550 population with no bank.
Montana	One detached drive-in facility within 1,000 feet permitted, no closer than 300 feet from another bank or 200 feet from another facility.
Nebraska	One attached facility permitted if within 200 feet; one or two detached facilities permitted, if within same city, and if two, the one must be within 3 miles of bank.
Oklahoma	One attached facility permitted. One detached facility within 1,000 feet permitted.

Texas	Attached facility permitted if within 500 feet of bank. In counties over 350,000 population, one drive-in facility permitted if <i>within</i> 1,850 feet but <i>further</i> than 500 feet.
West Virginia	One detached drive-in or walk-in facility within 2,000 feet permitted.

The Colorado statute permits "no branch," but allows each bank one "detached facility" which may not be closer than 300 feet to another bank or its detached facility, unless the other bank consents to a closer location.¹⁴⁴ However, the Colorado Supreme Court does allow "affiliate banking." In *Peoples Bank v. Banking Board*, the court stated:

[I]t does appear from an analysis of our banking code that the legislature did intend to permit what is known as "affiliate banks," whereby, for example, modern and progressive book-keeping and accounting procedures may be employed by "smaller" banks through the contractual use of facilities of a "larger" bank, thus reducing overhead costs to both the smaller and the larger banks and thereby passing along larger profits to stockholders and less expensive charges to customers without the abuses, risks and problems of supervision often involved in branch banking.¹⁴⁵

The court found the statutory recognition for the existence of "affiliate banking" in Colorado in the criminal sanctions imposed for soliciting or accepting unlawful gratuities for favorable bank actions. A bank director, officer, employee, or "an affiliate of a state bank" can be found guilty of accepting such a gratuity. In this context, the present statute states that:

the term "affiliate" of a state bank shall include:

- (a) Any person who holds a majority of the stock of the bank or has been determined by the banking board to hold

144. COLO. REV. STAT. § 11-6-101(1) (1973 & Supp. 1976). The same section defines a detached facility: "Banking activities at such detached facility shall be restricted to receiving deposits, issuing money orders, cashiers' checks, and travelers' checks or similar instruments, cashing checks or drafts, making change, receiving note payments, receiving or delivering cash and instruments and securities, and disbursing loan proceeds by machines."

145. *Peoples Bank v. Banking Bd.*, 164 Colo. 564, 569, 436 P.2d 681, 684 (1968) (construing the statute before it was amended to permit the single detached facility).

a controlling interest therein, any other corporation in which such person owns a majority of the stock, and any partnership in which he has an interest;

(b) Any corporation in which the state bank or an officer, director, or employee thereof holds a majority of the stock and any partnership in which such person has an interest;

(c) Any corporation of which a majority of the directors are officers, directors or employees of the state bank or of which officers, directors, trustees, or employees constitute a majority of the directors of the state bank.¹⁴⁶

Under subsection (c) above, a wide variety of corporations could be held to be "affiliates of a state bank" with sufficient interlocking personnel, but it is difficult to find here a specific authorization that another *bank* may be organized as an affiliate.

The facts pleaded in *Peoples Bank* demonstrate the limits to which the court was willing to stretch the definition of "affiliate" in the criminal offenses section of the banking code to authorize "affiliate banking." The competitor bank plaintiff contended that defendant Guaranty Bank, through one of its executive officers, "put together" the materials contained in the application for a new bank charter, and that

the stock ownership of both [was] the same and proportionately identical; the board of directors [were] the same; the chief executive officer [was] the same; the officers of the new bank [came] from Guaranty Bank and Trust Company; the working employees [were] to be furnished and trained by Guaranty Bank and Trust Company; and the accounting for the new bank [was] to be done by Guaranty Bank and Trust Company.¹⁴⁷

On these facts the court concluded: "Because of the anticipated contractual relations between Guaranty Bank and Trust Company and Guaranty Bank of Stapleton Airfield [the new bank], it could be said that they are 'affiliate banks' or engaged in 'affiliate banking'."¹⁴⁸ Thus, the prohibited branch banking is a single corporation with a single bank charter operating out of several geographically

146. COLO. REV. STAT. § 11-11-104(2) (1974).

147. 164 Colo. at 569, 436 P.2d at 683.

148. *Id.* at 571, 436 P.2d at 684.

dispersed offices. "Branching via holding company" occurs where there are two corporations, each with a separate bank charter, one as parent owning the stock in the subsidiary. "Affiliate banking," on the other hand, may also involve two corporations, two bank charters, but with common ownership of stock, common directors, common chief executive, and common officers. Writers have said that the holding company method is superior to the branch method because it preserves the principal of accountability and locality: the directors and officers of the subsidiary are fully accountable to the banking authorities and therefore will act independently of parent-office control and keep in tune with the local community and its interests. It is difficult to make the same argument for "affiliate banks."¹⁴⁹

Illinois prohibits branch banking.¹⁵⁰ Prior to 1976, Illinois permitted each bank to maintain one drive-in facility if within 1500 feet of the main bank. A 1976 amendment to the law allows two facilities, each of which may be drive-in or pedestrian or both. One must be within 3500 yards of the main bank, the other within 1500 feet. Neither may be closer than 600 feet from another main bank unless it meets one of three exceptions: 1) it is closer to the main bank than to another bank, 2) the bank obtains the irrevocable consent of the other bank, 3) the main bank is in downtown Chicago, under a complicated formula.¹⁵¹ The Illinois Foreign Banking Office Act of

149. The plaintiffs in *Peoples Bank* resorted to pleading the corporate law doctrine of piercing the corporate veil but lost on that ground as well. The court cited *First Nat'l Bank v. First Nat'l Bank Stock Corp.*, 306 F.2d 937 (9th Cir. 1962) (see note 167 *infra*). Eight months later, the same court with the same justice writing, allowed charters in holding company situations in two companion cases, *Gold v. Crane*, 167 Colo. 44, 445 P.2d 212 (1968) and *Nemirow v. Bloom*, 167 Colo. 42, 445 P.2d 214 (1968). On chain banking in Colorado, see Note, *Branch Banking in Colorado—A Proposal for Reform*, 48 DEN. L.J. 575 (1972).

150. No bank shall establish or maintain more than one banking house, or receive deposits or pay checks at any other place than such banking house, and no bank shall establish or maintain in this or any other state of the United States any branch bank, nor shall it establish or maintain in this State any branch office or additional office or agency for the purpose of conducting any of its business.

ILL. ANN. STAT. ch. 16 ½, § 106 (Smith-Hurd Supp. 1978). A discussion of how much "default branching" there is in Illinois is given in Note, *Federal Saving and Loan Law*, 51 CHI.-KENT L. REV. 656 (1974).

151. ILL. ANN. STAT. ch. 16½, § 105(15) (Smith-Hurd Supp. 1978). The services are limited to "receiving deposit, cashing and issuing checks, drafts and money orders, changing money and receiving payments on existing indebtedness." *Id.* § 105(15)(c). These two facilities are in addition to any facility adjacent to or connected to the main bank. *Id.* § 105(15)(e). If separated from the bank by not more than an alley, it should be connected by subterranean or overhead passage or by public or private way. *Id.* § 102.

1973 allows each bank of a foreign country to establish one banking office in the central business district of Chicago.¹⁵²

No new state statute has dealt with electronic bank facilities, but when the two largest national banks in Chicago tried to establish customer banking communication terminals, the federal court held them to be "branches" and hence forbidden to national banks under the McFadden Act.¹⁵³

Kansas prohibits "any branch bank, or branch office or agency," but allows some facilities limited by number, distance, and service provided. Each bank may have one attached auxiliary teller facility on its premises. In addition, each may have not more than three detached auxiliary banking services facilities, but one must be located within 2,600 feet of the bank. All must be within the same city as the main bank, or within the same township if the main bank is not in an incorporated area. None may be within 2,600 feet of another main bank or within 50 feet of another bank's detached facility.¹⁵⁴

In addition, any bank, individually or jointly with one or more others, may operate a "remote service unit" anywhere in the state and they are not considered branches or detached facilities.¹⁵⁵

Before 1971, Minnesota was a strict unit banking state.¹⁵⁶ Each bank may now have one "detached facility" as a drive-in or walk-up unit or both, if within 3,000 feet of the bank and not closer than 100 feet of another bank or 50 feet of another bank's detached facility.¹⁵⁷ Service at detached facilities is limited to "receiving deposits of every kind, cashing checks or orders to pay and receiving payments payable at the bank."¹⁵⁸

152. *Id.* §§ 501-519.

153. *Illinois ex rel. Lignoul v. Continental Ill. Nat'l Bank & Trust Co.*, 536 F.2d 176 (7th Cir. 1976). For an analysis of this case, see 52 NOTRE DAME LAW. 527 (1977).

154. KAN. STAT. § 9-1111 (1975). Services are limited to "rental of safe deposit boxes, receiving deposits of every kind and nature, cashing checks or orders to pay, issuing exchange and receiving payments payable at the bank." *Id.* § 9-1111(d)(1).

155. *Id.* § 9-1111(f). The unit may be "on line" or "off line" but must be activated only by "the use of a machine-readable instrument in the possession and control of the holder of an account with the bank." *Id.* § 9-1111(h).

156. MINN. STAT. ANN. § 48.34 (West 1970).

157. *Id.* §§ 47.51 to .52 (West Supp. 1977). The maximum distance was increased in 1974 from 1,000 feet. The statute also defines "attached facility," but does not specifically authorize one. The provisions were amended in 1977. *See id.* §§ 47.51 to .52 (West Supp. 1978).

158. *Id.* § 47.53 (West Supp. 1977). *See also id.* § 47.53 (West Supp. 1978) (amending language).

Missouri does not permit branch banking¹⁵⁹ with two exceptions. A 1959 statute permitted each bank a single drive-in and walk-up facility with service and distance limitations. Since amendments enacted in 1971 and 1972, each bank may now have two such facilities but service is limited. Only the following services may be provided: "checks may be paid, deposits received, deposits withdrawn, change made, exchange made, bank money orders issued, safe deposit boxes maintained and rented and loan payments received." The facilities must be within the same municipality and same county. The facility may not be less than 400 feet from another bank without that bank's consent, unless it is closer to the parent bank than to the other bank.¹⁶⁰

The second exception applies only to banks located in a "county of the second, third or fourth class."¹⁶¹ They may have one separate facility in a town within the same county provided it has less than 1,550 population, has no banking services, and is within 15 miles of the main bank.¹⁶² Any other kind of office of a Missouri bank or trust company which does not meet those two allowed exceptions is a prohibited branch.¹⁶³

Montana allows a single detached drive-in and walk-up facility within 1,000 feet of the main bank. It may not be closer than 300 feet from another bank or 200 feet from another bank's detached facility.¹⁶⁴ In 1977, Montana enacted an extensive Montana Electronic Funds Transfer Act.¹⁶⁵ Satellite terminals will not be subject

159. "[N]o bank or trust company shall maintain in this state a branch bank or trust company, or receive deposits or pay checks except in its own banking house or as provided in [§§ 362.107 and 362.108]." MO. ANN. STAT. § 362.105(1) (Vernon Supp. 1978).

160. *Id.* § 362.107. The new amendments deleted an additional requirement that the facility be within 1000 yards of the bank.

161. That includes all counties with an assessed valuation of less than three hundred million dollars. *Id.* § 48.020.

162. *Id.* § 362.108. Such facilities may make loans.

163. A downtown St. Louis trust company which "engaged in trust and investment service exclusively" and did not exercise any other banking power sought to open an office in Clayton, Mo., about 9 miles distant. No trust assets were to be held at the Clayton office, but the trust company would interview and consult with prospective customers and their lawyers, receive documents, do record keeping, carry on a general real estate business and provide investment advice there. The court found this a prohibited "branch." *St. Louis Union Trust Co. v. Pemberton*, 494 S.W.2d 408 (Mo. App. 1973).

164. MONT. REV. CODES ANN. § 5-1028 (Supp. 1977). Service is "limited to receiving deposits of every kind, cashing checks on orders to pay, receiving payments payable at the bank and such other transactions as are normally and usually conducted or handled at teller windows in the main banking house."

165. *Id.* §§ 5-1701 to -1721 (with legislative findings in the benefits of the new technology).

to the restrictions on detached facilities but are subject to some distance limitations.¹⁶⁶

The restrictions on branching and detached facilities do not prohibit holding company banking.¹⁶⁷

Nebraska allows one attached auxiliary teller office and the attachment may be by walkway, tunnel, or pneumatic tube, provided the office is within 200 feet of the main bank building and not closer than 300 feet of another bank or its attached or detached auxiliary office. In addition, each bank may have one or two detached auxiliary teller offices as drive-in and walk-up facilities, if within the same municipality. If a bank establishes two, one must be within 3 miles of the main bank.¹⁶⁸ A recent amendment to the Electronic Funds Transfer Act allows any bank to "establish and maintain any number of electronic satellite facilities or manned electronic satellite facilities" at which a wider range of banking services may be available.¹⁶⁹

Oklahoma states its policy: "Branch banking is prohibited in this state."¹⁷⁰ Each bank may operate one attached facility and one detached facility for drive-in or walk-up service if located within 1,000 feet of the main bank.¹⁷¹ Bank holding companies are prohibited by a 15% stock limitation.¹⁷² A 1976 amendment allows consumer banking electronic facilities.¹⁷³

The Texas Constitution,¹⁷⁴ authorizing the incorporation of "corporate bodies with banking and discounting privileges," states: "Such body corporate shall not be authorized to engage in business at more than one place which shall be designated in its charter."

The constitutional mandate has been implemented by statute which describes the term "one place." The Texas Attorney General

166. *Id.* §§ 5-1028(3), -1708.

167. *First Nat'l Bank v. First Bank Stock Corp.*, 197 F. Supp. 417 (D. Mont. 1961), *aff'd*, 306 F.2d 937 (9th Cir. 1962).

168. NEB. REV. STAT. § 8-157 (1977). Both attached and detached facilities are limited to "receiving deposits of every kind and nature, cashing checks or orders to pay, issuing exchange, and receiving payments payable at the bank."

169. *Id.* § 8-157(3)-(8).

170. OKLA. STAT. ANN. tit. 6, § 501. (West Supp. 1978-1979).

171. *Id.* § 415. Three different amendments passed in 1971. As to services permitted at attached and detached facilities, the controlling one is apparently "Any banking function may be performed at the facility save that of making loans."

172. *Id.* § 502 (West 1966).

173. *Id.* § 422 (West Supp. 1978-1979).

174. TEX. CONST. art. 16, § 16.

has expressed the opinion that the legislature has limited leeway in simply defining "one place" to indicate more remote drive-in facilities thereby authorizing closer drive-in facilities.¹⁷⁵ The current statute defines "functionally one place of business" as including:

- a) office facilities whose nearest wall is located within 500 feet of the nearest wall of the bank and is physically connected by tunnel, passageway, hallway or pneumatic tube or other similar carrier and,
- b) in counties with population over 350,000, one automobile drive-in facility if within 1,850 feet but more than 500 feet . . . connected by tunnel, passageway, hallway or "pneumatic tube or other similar carrier."¹⁷⁶

A more recent Texas Attorney General's opinion would seem to undermine the "one place 'concept'." "Banks do not violate Article XVI, section 16 of the Texas Constitution when its drive-in facility which houses only tellers is connected with the main building by closed circuit television cable."¹⁷⁷

West Virginia allows a single drive-in or walk-in facility if located within 2,000 feet.¹⁷⁸ Mobile units are specifically prohibited, except as temporary banking quarters pending construction of a permanent bank building.¹⁷⁹

CONCLUSIONS

Before turning to some ancillary areas of multi-location banking, a few preliminary conclusions can be drawn from the state regulation of branching by state banks.

The recurring political and economic controversy over branch banking is part of the fabric of banking history in the United States. The resulting diversity and complexity of this regulation among the

175. OP. TEX. ATTY. GEN. NO. M-849 (1971).

176. TEX. REV. CIV. STAT. ANN. art. 342-903 (Vernon Supp. 1978).

177. OP. TEX. ATTY. GEN. NO. LA-96 (1971).

178. W. VA. CODE § 31A-8-12(a) (1966). The facility is allowed "for the purpose of receiving bank deposits of all kinds, cashing checks, making change, selling and issuing money orders and travelers checks and receiving payments on installment, savings and rental accounts, and for no other purposes."

179. *Id.* § 31A-8-12(a) (Supp. 1978). A 1975 revision now prohibits group banking; no one may own or control 25% or more of the voting stock of two or more banks. But holding company banking is permitted. The provision does not apply to state or nationally chartered banks. *Id.* § 31A-8-12(b).

states would hearten any Federalist or more modern states' rights advocate who could see therein proof of the value of permitting diverse state approaches.

What attitudes underlie these diverse regulations? Since before Alexander Hamilton, Americans have felt strongly about banks, for example, some states like Texas prohibited them outright for years. People feel strongly about banks because they feel strongly about money, whether already-earned money they have deposited for safe-keeping or money available for loans and credit. For most people, money is at least the second most important concern in their lives.

Banking is urban. Whether a state permits branching or not, statutes repeat a common theme that banks or branches should be located in "cities" or "towns." There must be a community, a cohesive settlement;¹⁸⁰ Americans do not want banks along the highways like motels or general stores. A persuasive argument can be made that a roadside bank would not be viable as a credit-creating institution. Aside from the merits of that argument, the fact is that most state statutes would prohibit the attempt. Regardless of how rural the state, banks are its urban institution.

While the popular notion is that a bank is a building where the money is, a bank, as bankers know, is where bookkeeping entries and electronic data describe where the credit is. Nevertheless, banks are stable and should appear so. A state may permit a branch bank but deny its operation from a mobile unit, as for example in Maine. Where mobile units are permitted, they may be required to stay at the same location all day. People are simply reluctant to put their money in a truck which is about drive away. Thus, drive-in facilities cause less concern if they are physically attached to the main bank building by underground tunnel, by overhead passageway, or by pneumatic tube. On the other hand, there is little objection to an armoured car *bringing* money, for example, to cash checks at a factory gate. Similarly, automatic teller machines which *dispense* cash are more easily accepted, while in making deposits, we prefer to place money directly into a slot in the bank building.

In Justice Brandeis' fine phrase, banks are in the business of handling "other peoples' money." The popular view is that the temptations must be unbearably great; therefore, the suspicions run strong. One antidote to these suspicions is to require banking to be

180. A discussion of "the village requirement" under Michigan law is given in Grunewald & Wein, *supra* note 115, at 1139-43 (citing cases).

done in the open, in full view. Statute after statute requires that all banking business be done on the banks' premises, evidencing a distrust of loans and deals made in the streets, in bars, or elsewhere. The bank tradition of openness leads to the large open central bank floor as the architectural standard, not a maze of offices with doors which can be closed.

The banker's basic assumption about his business is that it is possible to be quite rational about money. Money and credit are commodities to be marketed quickly and efficiently. Like football coaches who often respond to reporters, "we've just got to move the ball around more," bankers since Keynes could, paraphrasing the sentiment, state: "We've just got to move the credit around more."

The accountants' view is still more rational, if not cold-blooded. To them, banking is basically a series of bookkeeping entries. Whether those entries are done by hand, by machine, by "processing" checks, or by electronic fund transfer is a question of efficiency, not of substance.

The popular view not merely rejects such a rational approach to money, but also distrusts the kind of person who can think that way about money. This distrust is supported by the public's appreciation that while bankers may present the appearance of merely being rational about money, the practice of their art is lucrative. The American image of a banker has never been that of an ordinary working man doing moderately well at a well-understood craft. Whether accurate in fact or not, the image is of a person with a skill that most of us lack, with a skill that most of us do not understand, and who turns that skill to personal advantage. While bankers may be necessary, they know too much.

Much of the anti-branching feeling in America, therefore, seems to rest upon a desire to keep banks in their place, physically, economically, and socially. A ban on branching keeps banks local, as it is felt they should be. Guidelines for issuing new bank charters stress the need to have people in the local community acting as the bank's organizers and directors. Loan money should be kept at home in the local community. Statutes which permit branches to be opened in foreign countries usually restrict the percentage of the bank's assets which can escape the jurisdiction.

The monopolistic aspect of branch banking cuts both ways, with those pro-branching and those anti-branching each calling the other the monopolists. Small-town banks fear that unlimited statewide branching will lead to the big city banks opening up in every small

town and driving out the local bank through their economies of scale. What the giant grocery-store chains did to the local mom-and-pop groceries in a prior era will, it is argued, occur again with big city banks driving local retail banks to the wall.

Proponents of branching claim it is the small-town bankers who are the real monopolists—the ban on branching is desired to protect their small local monopoly with its inefficiencies, dictatorial manner, and unresponsive service. Branching, its proponents say, creates competition, hence operational efficiency and better services to the customers at a lower cost. In an economic universe in which bank charters are limited by public policy, every bank is a monopoly to some degree. Therefore the question should be: How much competition do we want among these limited monopolies?

Nevertheless, underlying all the accusations about who is the real or potential monopolist and the claims of real or hoped-for efficiencies is the basic anti-branching sentiment based on the feeling that banks should be *local*. A local bank's primary concern is the local community because it must be. Knowing this, banks which can and do branch successfully leave a great deal of autonomy to local branch managers, or, in the case of chain banking via holding companies, to the local president and board of directors. The suspicion remains, however, that when a financial crisis comes, branches can be closed, and those closed will surely be the branches unprofitable to the main office.

To the degree that there has been a discernable trend in recent years, it is towards permitting more branching, branching over a wider geographical area, and increased use of limited service detached facilities of one kind or another. This trend may merely reflect an increased mobility of Americans and the corresponding loss of sense of community. Today, it may be comforting to the mobile middle American to open a new account at a branch of his same bank in his new community because of the difficulty in quickly developing good relations at a new, different, and locally-entrenched bank.

II.

RELATED FIELDS IN BRANCH BANKING

A complete understanding of branch banking requires a brief look at five related fields of law. The interplay among these will place into context the state regulation of branching by state banks.

First, a summary of four methods of bypassing a state statute against branch banking will be presented: de facto branching via holding companies, group banking, bank service corporations, and correspondent relationships. Second, related problems of monopoly and concentration will be examined. Third, an overview of the current status of branching by national banks under the McFadden Act is given. Fourth, the "other business," savings and loan associations, their expanded business, and the branching of the federal savings and loans will be considered. Finally, the current status of various Electronic Fund Transfer systems (EFT's) will be analyzed. Each topic deserves article-length analysis and many have in fact been the subject of extensive treatment elsewhere. The summaries which follow are only indications of the bypaths down which the branch banking controversy has scattered.

THE ECONOMIC IMPETUS TO BRANCH

The urge of banks to establish branches came as America became more industrial, urban, and suburban.¹⁸¹ The central business of commercial banks was to obtain deposits (interest-free demand deposits whenever possible, savings deposits if necessary) and use that deposit base to write loans, usually short-term business loans. In small-town America, both sides of the business were equally local. The banker's discretion was necessary for only the second half of the business, writing loans. Some potential borrowers were good risks, others less so. On the other hand, bankers accepted deposits from everyone, the only risks being an occasional bad-check addict or check-kiter. Whatever discrimination there was in taking deposits from the many and making loans to the few it was not perceived in small-town America as a *geographical* discrimination: taking money from the residential parts of town and loaning to businesses, located elsewhere.

As industrialization grew, primarily in urban areas, city banks needed a larger deposit base on which to meet the demand for business loans. A.P. Giannini at the Bank of America led the way with

181. In the early thirties, the trend toward branching loomed large. Then Professor Roger J. Traynor could introduce an article: "The recent rapid development of branch banking in this country, the desire on the part of many for nationwide branch banking at least within trade areas without regard to state boundaries . . ." Traynor, *Taxation Problems in Branch Banking*, 15 MINN. L. REV. 767 (1931).

branches in the countryside and suburban areas. Deposits from branches flowed to the cities for business loans. A single bank with many branches, one legal entity with one bank charter, was the simplest way to effectuate this fund transfer. In a similar fashion, as the suburbs grew, city banks wanted to follow their deposit customers to the suburbs with branch offices.¹⁸² The resistance to branches, however, did not come from objections to this funds transfer but from three other considerations: fear of a developing monopoly of city banks, fear that branches which were not locally owned and managed would be unresponsive to local needs for loans, and the difficulties state bank examiners foresaw in auditing a bank with assets spread out over many locations.

Whenever commercial banks lost the political and legislative battle for legal, *de jure* branches, they tried a number of alternative means toward the same end of credit transfer from far-flung depositors into their more concentrated loan business. A few of these devices, sometimes called *de facto* branching, can be briefly summarized.

DE FACTO BRANCHING

Holding Companies and "Chain Banking"

All or a controlling portion of a bank's shares may be held by a parent holding company. When a parent holding company controls two or more banks through this device, the holding company might develop sufficient uniformity of operations and credit transfer to have *de facto* branches. A holding company might arrive at the *de facto* branching status by either of two procedures. First, it might seek a new charter *de novo* for each subsidiary bank. Second, it might acquire control of an existing chartered bank by purchase, merger, or consolidation. The latter method will raise antitrust questions, to be discussed later.

However a holding company becomes owner of several banks, each subsidiary bank has its own charter, is a separate entity, has its own local board of directors, and is examined separately. States which prohibit *de jure* branching can be more lenient toward the

182. See McHatton, *The Bank Holding Company and the Sherman Act: The Validity of Cooperation Among Commonly Held Banks*, 18 ARIZ. L. REV. 147, 150-51 (1976) [hereinafter cited as *Bank Holding Company*].

holding company method,¹⁸³ and this leniency can be accounted for by several different considerations. First, the subsidiary bank is still local, with its own local board. Second, it appears easier for state bank examiners to evaluate it. Third, should a subsidiary bank become insolvent, it is much easier to sort out the claims of its depositors and other creditors. The desired fund transfer to the "main bank" can be effectuated through a "correspondent account," that is, the subsidiary keeps a sum on deposit, interest free, at the main bank in exchange for a variety of services.

In 1956, Congress brought bank holding companies under the federal control of the Federal Reserve Board. The Bank Holding Company Act¹⁸⁴ gives the Board the power to grant or deny acquisitions or mergers after receiving recommendations from the Comptroller of the Currency (acquisitions of national banks) or from the state banking agency (acquisitions of state banks). For resulting state banks not members of the federal reserve system but insured by the Federal Deposit Insurance Corporation, FDIC approval is necessary.¹⁸⁵ Congress did not indicate a presumption for or against holding company expansion.¹⁸⁶

Group Banking

A group of investors who hold a controlling interest in one bank may apply for a de nova charter for a new bank. Where state banking authorities permit this and are persuaded the group meets the state's requirement of the "localness" of the investors, the same persons may control several banks. The same ease of oversight is present for state bank examiners, but the operation is less subject to attack of centralized control as when a parent holding company is present. As with the holding company operations, actual fund transfers can be made through correspondent relationships with a main bank.

183. Eleven states have statutes permitting the acquisition by merger or consolidation of additional banks: Connecticut, Idaho, Kentucky, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Utah, Virginia, and Washington. Only five of them require that the resulting situation conform with their policy on de jure branches. A common requirement is that the acquired bank have been in existence at least five years.

184. 12 U.S.C. §§ 1841-1850, 1971-1978 (1970).

185. *Id.* § 1828(c).

186. Comment, *Bank Charter, Branching, Holding Company and Merger Laws: Competition Frustrated*, 71 YALE L.J. 502, 521 (1962).

Bank Service Corporations

As the banking industry has expanded the services it offers, smaller unit banks find themselves at a disadvantage in not being able to internally fund the staffing necessary to offer these services to their own customers. They can contract with a bank service corporation for various computer operations, trust servicing and management, and the like. The bank service corporation may be a subsidiary of or controlled by a larger bank. The quid pro quo of the relationship is the maintenance of a correspondent account at the larger bank. Several states have specifically excluded bank service corporations from their statutes on branch banking.

Correspondent Accounts

When all else fails, banks can fall back upon the traditional device of a correspondent account. For various services including check-clearing, a smaller bank maintains an interest-free account at the larger bank. Banking practices in states like Illinois indicate that the more a state opposes branching, the more vigorous larger banks are in developing correspondent relationships with smaller, outlying banks. In addition to these alternatives to branching, there are three anti-monopoly considerations which affect de facto branching. These will be explored in the next three sections.

ANTI-MONOPOLY CONSIDERATIONS

Concentration Statutes

A new development in state regulation is the limitation by statute of the concentration that a bank or a bank holding company may have, irrespective of the method by which it obtained that concentration. Iowa limits any bank holding company to 8 percent of the total bank deposits in the state.¹⁸⁷ New Hampshire and New Jersey limit holding companies to 20 percent of bank deposits in their states.¹⁸⁸

187. IOWA CODE ANN. § 524.1802 (West 1970).

188. N.H. REV. STAT. ANN. § 384-B:3 (1968); N.J. STAT. ANN. § 17:9A-345 (West 1963). Similar proposals have been made in Texas by constitutional amendment, and in Tennessee through a governor's veto message. See Verkuil, *supra* note 1, at 1363 n.92; Baker, *State Branch Bank Barriers and Future Shock—Will the Walls Come Tumbling Down*, 91 BANKING L.J. 119, 133 (1974).

Antitrust

Since banking is such a heavily regulated industry, it was long believed that it would not be subject to antitrust laws. Ending speculation in 1963, the United States Supreme Court ruled contrary to expectations,¹⁸⁹ but during the following twelve years of antitrust cases involving mergers claimed to violate section 7 of the Clayton Act or section 1 of the Sherman Act, it was not clear how well traditional antitrust concepts would apply to bank mergers. This period of judicial explorations into the anticompetitive activities of banks culminated with, or was highlighted by, the Supreme Court's 1976 decision in *United States v. Citizens & Southern National Bank*.¹⁹⁰

Citizens & Southern National Bank was a classic instance of de facto branching using a holding company to avoid Georgia restrictions on branch banking, applicable to national banks in Georgia under the McFadden Act. Citizens & Southern National Bank (C&S) acquired over 100 de facto branches through de novo charters or acquisition of existing banks, calling these de facto branches "correspondent associates." By 1960, Georgia statutes limited a holding company's stock ownership in such de facto subsidiaries to 5 percent. C&S caused enough of the remainder of each subsidiary's stock as necessary for control to be held by its directors, officers, and customers. C&S selected chief officers of the de facto branches, decided upon their promotions, gave the subsidiaries financial support, operations manuals, and services and data on C&S pricing of interest rates and service charges "for information only." The Court found that even before the acquisitions of C&S, there was no competition between the banks nor was there likely to be in the future. The Court found no antitrust violations in a decision which may be more important for antitrust law generally than for banking law.¹⁹¹

189. *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963).

190. 422 U.S. 86 (1975). The case is commented upon at: *Bank Holding Company*, *supra* note 182; Velvel, *Carving Holes in the Sherman Act: A Comment on the Citizens & Southern Case*, 25 CATH. U.L. REV. 535 (1976) [hereinafter cited as Velvel]; 10 GA. L. REV. 641 (1976).

191. Professor Velvel's criticism of the majority opinion is summarized:

[N]or was the majority's axe confined to chopping holes in antimerger law. Rather, the Court also struck at four other highly important facets of antitrust law: the idea that price fixing is illegal, the concept that alleged procompetitive aspects of a restrictive practice will not immunize it from being declared an illegal restraint of trade, the idea that the lawfulness of a practice is measured as of the time of suit rather than as of a prior date, and the intra-enterprise conspiracy doctrine.

Velvel, *supra* note 190, at 535.

Rescue of Insolvent Banks

President Franklin D. Roosevelt's famous Bank Holiday on March 4, 1933 has had a profound effect on all subsequent banking history. A common assumption of banking regulators since has been that one of their main concerns is the prevention of bank insolvencies, and a key device for preventing insolvencies is the Federal Deposit Insurance Corporation (FDIC). While the FDIC could simply permit an insolvency and pay off depositors' claims up to the insured limits, it usually perceives its role as being to avoid that result and thus save its funds. It will assist a troubled bank through loans and assist the Federal Reserve Board in finding a suitable merger partner. If the acquiring bank will assume the liabilities along with the assets, it may pick up a string of de facto branches in the process. Both the FDIC and the Federal Reserve Board may be willing to intercede with the Justice Department for antitrust clearance for the merger.¹⁹² Of course, the FDIC's main concern is that the claims of *depositors* are assumed by the acquiring bank. The claims of other creditors may be given short shrift, especially in a situation where the Federal Bankruptcy Act does not apply to the bankruptcy of banks.¹⁹³

These related monopoly issues are ones which concern national banks as well as state banks. National banks can branch or use one of the alternatives to branching available to state banks.

BRANCHING BY NATIONAL BANKS

The McFadden Act of 1927 was designed to maintain a competitive parity between national and state banks in each locality. The basic scheme was to allow national banks to branch to the same degree state banks could.¹⁹⁴

192. The FDIC's role in the merger of the insolvent United States National Bank into Crocker National Bank in October, 1973 and the merger negotiations of the insolvent Franklin National Bank of New York in 1974 is reported in Rose, *What Really Went Wrong at Franklin National*, *FORTUNE*, Oct., 1974, at 225-27. See also Via, *Antitrust and the Rescue of Distressed Banks by Acquisition*, 94 *BANKING L.J.* 508 (1977).

193. This claim was made in *Braun v. Northern Ohio Bank*, 430 F. Supp. 367 (N.D. Ohio 1977).

194. 12 U.S.C. § 36(c) (1970) (as amended through 1962):

(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question;

President Kennedy's Comptroller of the Currency, James J. Saxon, attempted a liberal interpretation of the comptroller's statutory powers to approve branching by national banks. He argued that his office would look to state law to see *whether* state banks were allowed to branch and *where* branches were permitted, but would not be bound by the state-prescribed *method* by which the branching must be done. Thus, the Utah statute which permitted the establishing of branches only by acquisition of an existing bank which had been in operation not less than five years did not restrict the Comptroller from allowing a national bank in Utah to branch without meeting that requirement. That argument fell in 1966 in *First National Bank v. Walker Bank & Trust Co.*¹⁹⁵ Since *Walker Bank*, state law has controlled home-office restrictions and any other restrictions which are "part and parcel" of the state branching policy.¹⁹⁶

Three years later, in *First National Bank v. Dickinson*,¹⁹⁷ the Supreme Court decided a similar question: whether the very definition

and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks. In any State in which State banks are permitted by statute law to maintain branches within county or greater limits, if no bank is located and doing business in the place where the proposed agency is to be located, any national banking association situated in such State may, with the approval of the Comptroller of the Currency, establish and operate, without regard to the capital requirements of this section, a seasonal agency in any resort community within the limits of the county in which the main office of such association is located, for the purpose of receiving and paying out deposits, issuing and cashing checks and drafts and doing business incident thereto: *Provided*, That any permit issued under this sentence shall be revoked upon the opening of a State or national bank in such community. Except as provided in the immediately preceding sentence, no such association shall establish a branch outside of the city, town, or village in which it is situated unless it has a combined capital stock and surplus equal to the combined amount of capital stock and surplus, if any, required by the law of the State in which such association is situated for the establishment of such branches by State banks, or, if the law of such State requires only a minimum capital stock for the establishment of such branches by State banks, unless such association has not less than an equal amount of capital stock.

195. *First Nat'l Bank v. Walker Bank & Trust Co.*, 385 U.S. 252 (1966). See notes 5-7 and accompanying text *supra*. This leading case has been cited often. Several district courts distinguished some facts from its effect, but not since 1971. The state of the law on the eve of the *Walker Bank* case is given in Bell, *National Bank Branches—The Authority to Approve and to Challenge*, 82 BANKING L.J. 1 (1965).

196. 385 U.S. at 262.

197. 396 U.S. 122 (1969).

of what a branch is should be decided by state law or federal law. There, the national bank provided armoured car messenger service and off-premises receptacles for deposits. The Florida Bank Comptroller insisted that state law prohibited "off-premises banking of any kind" for state banks and therefore that conclusion was binding upon the national bank via the McFadden Act. The Court rejected this argument in light of the fact that the McFadden Act contained its own definition of "branch."¹⁹⁸ The Court held that the McFadden Act definition would be controlling; however, the activities of the First National Bank met that definition. Hence, the messenger services and off-premises deposit receptacles were branches and therefore prohibited to national banks in Florida.

Since *Dickinson* through 1976, there have been numerous cases applying the federal definition of what a branch is.¹⁹⁹ These cases have decided whether the federal definition includes holding company banking,²⁰⁰ group banking,²⁰¹ an office across the street connected by pneumatic tube,²⁰² a detached drive-in connected by pneumatic tube,²⁰³ and various mechanical devices, such as remote machines for withdrawal, deposit, and transfer of funds,²⁰⁴ a credit card-operated machine dispensing money which counts as an interest-charging overdraft,²⁰⁵ a deposit-receiving machine,²⁰⁶ a point of sale terminal in a clothing store,²⁰⁷ and customer-bank communications terminals.²⁰⁸

198. 12 U.S.C. § 36(f) (1970):

The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.

199. Also under *Walker Bank* there have been "location" cases, "necessity" cases, and "merger" cases.

200. *Central Bank v. Smith*, 532 F.2d 37 (7th Cir. 1976).

201. *Independent Bankers Ass'n v. Board of Governors of Fed. Reserve Sys.*, 516 F.2d 1206 (D.C. Cir. 1975).

202. *Dunn v. First Nat'l Bank*, 345 F. Supp. 853 (N.D. Ga. 1972) (not a branch).

203. *North Davis Bank v. First Nat'l Bank*, 457 F.2d 820 (10th Cir. 1972) (not a branch).

204. *Missouri ex rel. Kostman v. First Nat'l Bank in St. Louis*, 538 F.2d 219 (7th Cir. 1976) (held to be a branch).

205. *Independent Bankers Ass'n v. Smith*, 534 F.2d 921 (D.C. Cir. 1976) (held to be a branch).

206. *Colorado ex rel. State Banking Bd. v. First Nat'l Bank*, 394 F. Supp. 979 (D. Colo. 1975) (held to be a branch).

207. *Oklahoma ex rel. State Banking Bd. v. Bank of Oklahoma*, 409 F. Supp. 71 (N.D. Okla. 1975) (not a branch).

208. *Independent Bankers Ass'n v. Smith*, 402 F. Supp. 207 (D.D.C. 1975), *aff'd*, 534 F.2d

FEDERAL SAVINGS AND LOAN ASSOCIATIONS

Savings and loan associations (S&L's) also constitute a "dual system" with Federal S&L's, chartered by the Federal Home Loan Bank Board (FHLBB), and state-chartered S&L's. While the FHLBB has followed a policy similar to that mandated by the McFadden Act in maintaining a competitive equality between federal and state S&L's, the FHLBB is not under as strict a statutory mandate as is the Comptroller of the Currency where branching by national banks is concerned. The FHLBB may permit federal S&L's to engage in practices inconsistent with state practices.²⁰⁹

By 1973, only Illinois still prohibited its state-chartered S&L's from branching. The FHLBB persuaded itself that on the commercial banking side, Illinois had de facto branching via holding company and group banking and that Illinois state S&L's could follow suit. On January 12, 1973, the FHLBB voted to allow federal S&L's in Illinois to apply for de novo branches and began the processing of these branches January 31, 1973. Numerous state S&L's joined by some Illinois federal S&L's filed suits against the FHLBB challenging the actions. The eight cases, litigated by a large contingent of the Illinois bar, were consolidated in *Lyons Savings and Loan Association v. Federal Home Loan Bank Board*,²¹⁰ decided in March, 1974. The federal district court upheld FHLBB's authority and actions, and federal S&L's have branched vigorously in Illinois in the past several years.

Since federal S&L's have branched more vigorously than state or national banks, two related issues have been raised. The first is the distinctness of S&L's from commercial banks. It was long the tradition that S&L's and other "thrift institutions" were in a different business from that of commercial banks. The deposit base of banks was checking accounts: demand deposits which are by their nature short-term. The loan side of banks was also short-term, first business loans and later short-term consumer loans for automobiles and the like. The deposit base of S&L's is savings accounts, conceived of as essentially long-term deposits. S&L's were prohibited from

921 (D.C. Cir. 1976) (held to be a branch); *Illinois ex rel. Lignoul v. Continental Ill. Nat'l Bank & Trust Co.*, 536 F.2d 176 (7th Cir. 1976) (held to be a branch).

209. 12 U.S.C. § 1464(a) (1970). The FHLBB branching regulations are at 12 C.F.R. § 556.5 (1978).

210. 377 F. Supp. 11 (N.D. Ill. 1974). The case is commented upon in Note, *Federal Savings & Loan Law*, 51 CHI.-KENT L. REV. 656 (1974).

offering third-party checking services, but their savings accounts were given a competitive advantage over those of banks by the Federal Reserve's Regulation Q which permitted S&L's to pay higher maximum interest rates than banks. The loans made by S&L's were home mortgages, also long-term. They served the two social policies of promoting thrift and funding the housing market.

With the inflation of the 1970's, funds flowed out of S&L's in massive amounts to be invested at higher rates in bank Certificates of Deposit, money-market funds, corporate bonds, and other attractive investments. S&L's retaliated by inventing the Negotiable Order of Withdrawal (NOW accounts) which for most practical purposes serve as checking accounts but with one major advantage: they pay interest. Banks have been prohibited from paying interest on their checking accounts since 1933. In short, commercial banks and S&L's are becoming more and more indistinguishable in the nature of their business, a goal openly advocated by many reformers. In states which still restrict *de jure* branching, both state and national banks envy the increased branching possibilities of federal S&L's.

The second issue relates to the same urge to branch which motivates S&L's as well as commercial banks. Deposits are solicited from everyone, while home loans go to the most qualified (good risks) borrowers. Branching will permit a federal S&L to solicit deposits in whatever neighborhood or suburb they can be found, while the most qualified borrowers may be bunched by geographical locations. This inequality is critically referred to as "red-lining," and the geographical lines can be clearly seen where home loans are concerned.

Banks and S&L's have always discriminated among potential borrowers. This the nature of the business. But there are two kinds of discrimination practiced. The kind of discrimination which is not considered objectionable is based upon the qualifications of the individual borrower: credit rating, steady job, stable and conventional habits, etc. The second kind of discrimination, "red-lining," is generic and applied irrespective of the borrower's personal qualifications. The red-lining opponents object to the generic discrimination where "no more home loans in this neighborhood" will be granted due to the neighborhood's perceived state of decline. Equally generic discriminations can be made by banks: no more loans for laundromats, or mobile homes, etc. A term for a bank's generic discriminations has not yet been invented.

ELECTRONIC FUND TRANSFER

For the past several years, various Electronic Fund Transfer system (EFT's) have appeared to be the wave of the future.²¹¹ As noted in Part I, several states have recent legislation authorizing such systems.

Various types of unmanned automatic teller machines can dispense cash, accept deposits and loan payments, and transfer funds from one account to another (checking to savings, savings to checking).²¹² "Point-of-sale" terminals located in stores can charge a sale immediately to a depositor's checking account. The implications for savings on the vast and costly check-clearing processes are awesome.

The desire of many proponents is that the widespread use of various EFT systems not become enmeshed in the "branch banking controversy."²¹³ However, should computerized banking be developed independent of branching restrictions, new and complex problems of regulation of competition must be faced.²¹⁴

Many hopes that electronics would provide the final end-run around rigorous Illinois restrictions on branch banking were dashed in *Illinois ex rel. Lignoul v. Continental Illinois National Bank*.²¹⁵ The two largest national banks in Chicago, Continental Illinois National Bank and Trust and First National Bank of Chicago, installed "Customer Banking Communications Terminals" pursuant to an interpretive ruling of the Comptroller of the Currency that they would not be considered branches within the meaning of the McFadden Act definition. Bank customers could use these terminals for four functions: withdrawing cash from their savings, checking or credit card accounts; making deposits in currency or checks to

211. Recent articles include: Brace, *Electronic Funds Transfer System: Legal Perspectives*, 14 OSGOODE HALL L.J. 787 (1976); Note, *Electronic Funds Transfer Systems: A Need for New Law*, 12 NEW ENGLAND L. REV. 111 (1976); Note, *Effect of the Use of Customer-Bank Communications Terminals*, 45 U. CONN. L. REV. 591 (1976).

212. Note, *National Banks: Branch Banking and the "Total Teller,"* 9 WILLAMETTE L.J. 86 (1973).

213. See Kirby, *The Name's the Thing: Financial Communication Device, Not Automated Teller Machine*, 91 BANKING L.J. 135 (1974); Wolfson & Stephens, *You Can Bank On It: An Analysis of Judicial Branch Bank Characterization and an Alternate Proposal*, 5 RUTGERS J. COMPUTERS & LAW 389 (1976).

214. Note, *Electronic Funds Transfer in Iowa: Implications for the Regulation of Competition Among Federal and State Financial Institutions*, 61 IOWA L. REV. 1355 (1976).

215. Two cases consolidated as *Illinois ex rel. Lignoul v. Continental Ill. Nat'l Bank*, 409 F. Supp. 1167 (N.D. Ill. 1975), *aff'd in part*, 536 F.2d 176 (7th Cir. 1976) (*per curiam*).

their checking or savings accounts; transferring funds between accounts; and making payments on installment loans or credit card charges. The federal district court found the terminals to be "branches" under the McFadden Act definitions and thus prohibited under the *Walker Bank* and *Dickinson* decisions.²¹⁶

It is too early to tell if *Lignoul* is a temporary setback for ETS in an anti-branching environment or whether electronics will replace the entire branch banking issue in anti-branching states as well as pro-branching states. If the "cashless society" of Electronic Fund Transfers becomes a reality, who will care about the physical location of the computers which make the transfers?

Each step towards that cashless society has required a massive and pervasive readjustment in the thinking of Americans about their money. In the earlier part of the nineteenth century, we moved from a specie society to a banknote society. In the latter half of the nineteenth century we moved from a banknote society to a check society. Since the Second World War we have moved to a credit-card society. With checking accounts permitting overdrafts which result in one's writing one's own loan rather than writing a check which will bounce, Americans are used to living in a credit society as well as the former cash society. During the past several years, many states have passed the basic legislation for such EFT systems as automatic tellers and point-of-sale terminals while remaining steadfast on whatever policy they had regarding branch banking.

Nevertheless, at each step along the way, various segments of American society have embraced the next stage with various degrees of enthusiasm or reluctance. Some workers still want their week's wages in cash in a pay envelope on Friday. Others will still want their paycheck rather than have a bank's payroll service deposit their net wages directly to their account. Others will prefer to play their own "float" with checks for utilities and fixed expenses rather than allow the amounts to be automatically deducted by their banks. A point-of-sale terminal in the liquor store will deduct this day's purchase from a buyer's bank account now, but a buyer has weeks and weeks to deal with Master Charge.

The arguments for branch banking have always made a good deal of economic sense. Big banks can do many things and provide some services small banks either cannot do or cannot do efficiently. Big

216. Case commented upon in Note, *Applicability of "Branch" Bank Concept to Customer-Bank Communications Terminals*, 52 NOTRE DAME LAW. 527 (1977).

banks with branches share those advantages. Countering the rational economic reasons for preferring branching is the deep-seated distrust of bigness, especially in an industry viewed with suspicion in the first place. Electronic Fund Transfer Systems may be the end-run around the entire controversy, with the branching proponents winning the war but on a different battlefield. That victory can only be secured when most Americans readjust their thinking about their money from a credit-card society to less tangible credit-transfer society. This could take a generation or more and would still leave pockets of resistance.

